

# ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
 )  
Deployment Of Wireline Services Offering ) CC Docket No. 98-147  
Advanced Telecommunications Capability )

**REPLY COMMENTS OF AT&T CORP.**

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October 16, 1998

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## **SUMMARY**

Almost 90 parties have submitted comments, evidence, and studies to the Commission regarding the difficulties the industry will encounter as entrants attempt to accelerate advanced services deployment. Most of those comments provide substantial guidance as to how the Commission can promote the availability of ubiquitous, affordable advanced services.

Unfortunately, not all commenters chose to play a constructive role. In the NPRM, the Commission explicitly requested details on how it could augment its existing interconnection, unbundling, and collocation rules to accelerate advanced services deployment. Notwithstanding their control over virtually all of the relevant facilities and information – or, perhaps, because of it – the incumbent LECs have, for the most part, chosen to ignore that request. Instead, they repeat the same argument that the Commission and its state counterparts have rejected time and again as legally and factually baseless: that their local markets are “open” to competition and therefore no regulation of their conduct is required or allowed. The plain language of the Act, however, leaves no room for doubt that the Commission cannot grant the regulatory forbearance that the incumbents seek. Nor would such forbearance be sound policy even if it were not unlawful. As the Commission well knows, local markets are not open to competition and further Commission action to implement and enforce Section 251 of the Act is plainly necessary. AT&T’s Reply Comments describe the broad consensus among non-ILEC commenters as to those measures the Commission has proposed that it should (and should not) implement.

In Section I, AT&T refutes the ILECs' arguments that: (i) despite their control over bottleneck facilities used to provide advanced services, incumbents have no advantage over entrants in the provision of those services; and (ii) implementation of the Act's interconnection, collocation, and unbundling requirements will eliminate ILEC incentives to investment in the new technology and advanced services. That incumbents have just begun offering advanced services does not mean that they lack market power. While entrants and, in response, incumbents just recently began deploying xDSL services, the ILECs own and control the bottleneck facilities their competitors require to reach potential customers – a classic source of market power. Further, by providing nondiscriminatory access to collocation space and network elements (as most commenters strongly support), the Commission will subject the ILECs to competitive pressures and encourage the deployment of advanced services. ILECs will deploy advanced services both to gain an advantage over their new competitors and to protect themselves against entrant innovations. On the other hand, if the Commission immunizes ILECs from CLEC competition by failing to promulgate rules promoting nondiscriminatory access to collocation space and network elements, the ILECs will remain free to continue to protect their existing ISDN, T1, and residential second line offerings by retarding advanced services deployment and will provide advanced services only where other competitive pressures emerge.

Moreover, entrants' incentives to deploy facilities supporting advanced services will be augmented as well. Entrants already have strong incentives to break their dependency on their competitors. The proposed collocation and unbundling requirements will promote that process by allowing them to build a customer base from which entrants can justify additional

facilities deployment. Further, in those instances where entrants do lease the network elements necessary to provide advanced services, the ILECs will receive full compensation, including a risk-adjusted rate of return on their investments.

In Section II, AT&T discusses the overwhelming opposition to the Commission's proposed separate affiliate regime. The vast majority of commenters conclude that the NPRM's proposed separation requirements are wholly insufficient to justify a finding that the ILECs' advanced services affiliates would be non-ILECs under Section 251(h). A central purpose of the "successor or assign" provision in Section 251(h) plainly is to bar ILECs from evading their obligations under Section 251(c) through a "corporate shell game." Thus, many commenters, including state commissions, rightly express great concern that the NPRM proposal will encourage ILECs to transfer facilities and investments so as to evade their resale and unbundling obligations.

A significant majority of commenters also conclude that the separation obligations under Section 272 are wholly insufficient to justify deeming an affiliate a non-ILEC under Section 251(h), because they do not prevent ILECs and their affiliates from engaging in concerted anticompetitive conduct. Section 272 cannot protect competition where the ILEC still maintains monopoly control over bottleneck facilities. Hence, commenters broadly call on the Commission to take a number of prophylactic measures as part of any separate-affiliate regime. As an initial matter, the Commission should require that the ILECs and their advanced services affiliates, before they begin providing advanced services, establish that they have and will comply with all separation and disclosure obligations imposed by the Commission. Commenters

also recommend that, in light of the importance independent equity ownership plays in preserving truly independent action, the Commission should mandate outside ownership of the separate affiliate of the range of 20 percent to over 50 percent. Moreover, many commenters agree that the separate affiliate should be barred from providing advanced services through resale in order to reduce the opportunity for the ILEC and its affiliate to engage in a classic price squeeze and, for related reasons, they overwhelmingly condemn the NPRM's proposal to allow ILECs to make "de minimis" transfers of advanced services facilities to the affiliate without the affiliate being considered an assign.

Numerous commentators further conclude that an advanced services affiliate should be barred from using the ILEC brand. Indeed, it is axiomatic that an ILEC affiliate cannot be deemed to "function[] just like any other competitive LEC,"<sup>1</sup> if it comes to the market clothed in ILEC's brand. Nor can ILEC affiliates be considered truly separate of the ILEC unless they are prohibited from engaging in joint marketing and are not allowed discriminatory access to the ILECs' CPNI, because such opportunities cannot realistically be extended to nonaffiliated CLECs. By the same token, insofar as an ILEC advanced services affiliate obtains the right to access intellectual property embedded in a UNE, CLECs necessarily must be able to obtain that UNE on the same terms and conditions. Finally, a number of commenters rightly conclude that small ILECs should be subject to the same separation requirements as the large ILECs.

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<sup>1</sup> NPRM, ¶ 92.



Section III discusses the nearly universal agreement that access to unbundled loops is essential to advanced services competition. The comments leave no room for doubt that unbundling basic, xDSL capable, and xDSL equipped loops is technically feasible and will broaden the advanced services availability. The Commission also should act aggressively to promote entrant access to DLC and other loops passing through remote terminals. Commenters generally agree that these loop configurations present space and technical difficulties, but those problems can be overcome through loop grooming and other network modifications. More importantly, if the Commission adopts the rules proposed by AT&T and other commenters, ILECs will have greater incentives going forward to build remote terminals, configure their loops, and deploy new DLC technologies in such a manner that today's problems will be largely eliminated tomorrow. In addition, almost all commenters, including many ILECs, agree that advanced services competition will require incumbents to provide more information through their OSS and otherwise make their loop data available on a nondiscriminatory basis. And in order to prevent ILECs from using spectrum management as a strategic tool to deter entry, the Commission should convene an industry forum to establish guidelines regarding the nondiscriminatory application of industry spectrum management standards.

Section IV discusses the extraordinary difficulties commenters have experienced in obtaining physical collocation space in ILEC central offices and the Commission's clear authority to remedy many of these problems by promulgating additional national collocation rules. To that end, commenters believe that the Commission should explicitly require ILECs to permit Remote Switching Module and packet switching collocation as well as other equipment

useful in providing voice and advanced services. ILECs have failed to present any legitimate justification for prohibiting such collocation. Commenters also generally agree that “cageless” collocation, shared collocation, the removal of equipment no longer used and useful, and the elimination of “POTS Bays” will promote more efficient use of scarce collocation space. By contrast, virtual collocation is an inferior alternative to “cageless” collocation because it may: (i) deprive CLECs of access to their equipment; (ii) result in inexperienced ILEC technicians attempting to maintain the equipment; and, (iii) produce unacceptably long repair intervals when emergency repairs are required.

Sections V, VI, and VII confirm that most parties to this proceeding agree with AT&T that: (i) the Commission should not weaken its unbundling rules by changing its classifications of various facilities that it has previously held are network elements under Section 251(c)(3); (ii) the proposed “targeted” interLATA relief would subvert Section 271, violate Section 10(d), diminish ILEC incentives to open their local markets, and create an administrative nightmare for the Commission; and, (iii) under the plain language of Section 251(c)(4) ILECs’ advanced service offerings are subject to the resale obligation because they are “telecommunications service[s] that the [ILEC] provides at retail to subscribers who are not telecommunications carriers[.]”

Finally, Section VIII discusses the heightened need for access charge reform created by the increasing availability of advanced services to residences and small business. As MGC Communications demonstrates, these bloated charges already have created serious market distortions. In particular, they create an artificially high incentive for carriers to deploy phone-

to-phone IP service facilities. At the same time, IP voice and data applications promise to customers around the country a wide array of attractive new services. The Commission, then, should not penalize innovative carriers like AT&T, Qwest, IDT, and ICG who have begun offering phone-to-phone IP service by imposing on those services inflated, subsidy-laden access charges. Instead, the Commission should promote the interests of all consumers by immediately acting on the petitions currently before it and reducing access charges to competitive levels.

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**REPLY COMMENTS OF AT&T CORP.**

Pursuant to the Revised Public Notice released on August 12, 1998, AT&T Corp. ("AT&T") respectfully submits these reply comments on the Commission's Notice of Proposed Rulemaking ("NPRM") regarding rules the Commission may adopt to encourage competition in, and timely deployment of, advanced telecommunications capabilities.<sup>2</sup>

**INTRODUCTION**

In the NPRM the Commission requested the specific data and proposals needed to ensure that its national interconnection, collocation and unbundling standards provide the nondiscriminatory access to network facilities required by the Act and promote real competition in the provision of advanced services over those facilities. As the Commission has recognized, the availability of these new services in a competitive environment promises enormous benefits to all consumers. Notwithstanding their control over virtually all of the relevant facilities and

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<sup>2</sup> A list of the commenters and the abbreviations used for them in these reply comments is attached as an Appendix.

information – or, perhaps, because of it – the incumbent LECs have, for the most part, chosen to ignore that request.

The incumbents propose no solutions to the hurdles currently limiting entrant access to remote terminals; they do not even supply the data that might allow others to come up with solutions. Instead, they propose denying their potential competitors access to loops at remote terminals. The incumbents do not disclose the loop characteristic information that is in their possession; rather, they oppose any expansion of existing OSS requirements as “burdensome.” And incumbents do not discuss methods of deploying xDSL services to customers served over IDLC configured loops. They simply proclaim that it cannot be done.

Instead of making a constructive contribution to this proceeding, the incumbents raise the same legally and factually bankrupt flag that they have flown in every regulatory proceeding since the passage of the Act: that their local markets are “open” to competition and therefore no regulation of their conduct is required (or, indeed, allowed). The reality is quite different, and the incumbents’ comments cannot be taken seriously. As an initial matter, the regulation the incumbents seek to evade is mandated by the plain terms of the Act. In all events, the incumbents’ own conduct over the past three years conclusively demonstrates that they can and will exploit any opportunity to impede competition, and that strong pro-competition national rules are therefore imperative. As MCI WorldCom (p. 70) aptly notes, “[n]othing has contributed more to the failure of facilities-based local competition to develop since the passage of the Act than the ILECs’ refusal to comply with their statutory obligation to provide reasonable, nondiscriminatory, and cost-based unbundled access to the local loop, including

related OSS.” Absent Commission rules that clearly and directly require nondiscriminatory access to the local facilities used to provide advanced services, the same anticompetitive incumbent incentives and abilities can be expected to cripple the competitive provision of those services.

Fortunately, the many other participants in this proceeding have taken the NPRM seriously. And, as discussed below, these parties have reached a general consensus regarding the principal steps the Commission should take to implement the Act’s requirements and promote advanced services. Regarding the separate affiliate proposal, the majority of commenters urge the Commission to read Section 251(h)(1) as it should be read – to bar ILECs from evading their obligations under Section 251(c) through a “corporate shell game.” Moreover, a number of state commissions, conclude that the proposal would have the unintended effect of incenting ILECs and their affiliates to engage in concerted anticompetitive conduct and to shift network facilities and investments to the affiliate so as to evade the ILECs’ unbundling and resale obligations under the Act, underscoring the fatal lack of detail concerning the types of facilities and services that may properly be controlled by the affiliate. Further, the affiliate discussed in the NPRM would nonetheless be subject to ILEC regulation as a “comparable carrier” under Section 251(h)(2).

If the Commission nonetheless determines to proceed with the separate affiliate approach, a broad array of comments, again including the majority of those submitted by state commissions, confirm that the safeguards required under Section 272 are entirely insufficient to limit both the ability and the incentive of ILECs and their affiliates to engage in concerted

anticompetitive conduct. They urge significant strengthening of the proposed separation requirements to ensure sufficient separation and operational independence of the affiliate from the ILEC so that it functions like any other CLEC and derives no anticompetitive and discriminatory advantages from the ILEC. Without these added requirements, the affiliate cannot properly be deemed truly separate from the ILEC such that it can lawfully be exempted from the unbundling and resale obligations of Section 251(c).

In particular, commenters widely call on the Commission to require (i) a prior approval process; (ii) a significant and meaningful amount of outside ownership of the affiliate so as to encourage the affiliate to act in its own corporate self interest rather than simply as an ILEC alter ego. In addition, commenters stress the need to enforce vigorously the nondiscrimination requirement, and, correspondingly, support a bar on the affiliate's use of the ILEC brand, joint marketing and discriminatory access to CPNI, and the affiliate's resale of ILEC services. Commenters also object strenuously to any transfers, de minimis or otherwise, of advanced services facilities to the affiliate.

There is also a strong consensus among non-ILEC comments regarding the rules the Commission should adopt regarding loops. These commenters agree that the Commission should ensure that entrants have nondiscriminatory access to basic, xDSL capable, and xDSL equipped loops, even if a loop must be conditioned or groomed to provide the requested service. Thus, the Commission should establish national rules that prohibit ILECs from impeding entrant access to those loop types and all their features, functions, and capabilities. The comments also demonstrate that the Commission should clarify and expand its existing OSS rules so that

entrants can determine what advanced services could be provided to a particular customer in the same manner that ILECs can make this determination. Further, the Commission should convene a forum to prevent the kind of discriminatory application of spectrum management standards that CLECs have already encountered. And because remote terminals create a strategic opportunity for ILECs to hide loops and discriminate against their potential competitors, the Commission should adopt rules that promote parity of access to remote terminals and the services that ILECs can offer using those facilities. As the demand for advanced services expands, ILECs will place increasing reliance on remote terminal configured loops to achieve higher quality service and transmission speeds. Consequently, in order to prevent ILECs from “hiding” local loops when a loop passes through a remote terminal by raising claims of space exhaustion or technical feasibility, the Commission should require ILECs to provide xDSL equipped loops and require the construction of new remote terminals to take into account the needs of CLECs for collocation.

The comments also evince broad agreement that the Commission has authority to and should expand its collocation rules. ILECs continue to unreasonably restrict access to and use of collocation space thereby significantly undermining local competition. As the comments indicate, these tactics have the potential to be even more devastating for competitive advanced service offerings than for basic services. Thus, most carriers and state commissions agree that the Commission should expand the types of equipment that can be collocated to include, inter alia, remote switching modules and packet switches. In light of rapid technological change, the Commission also should refrain from limiting permissible equipment to particular types of



technology. And many parties like AT&T demonstrated convincingly that the Commission should permit “cageless” collocation, eliminate of POTS Bays, and allow interconnection using copper cables. AT&T and other commenters further demonstrated that the Commission should promote the efficient and nondiscriminatory use of central office and remote terminal space by (i) requiring ILECs to remove equipment that is no longer used or useful, (ii) allowing CLECs who have been denied space to tour central offices and confirm that space is indeed not available, and (iii) limiting the amount of space that the ILEC’s separate affiliate may occupy in a central office or remote terminal.

Finally, the incumbents again stand virtually alone in their requests for relief from existing interLATA restrictions, resale obligations, and unbundling requirements. The relief they request would violate the plain language of the Act and seriously undermine competition for advanced services. These requests should be denied.

#### **I. INCUMBENT LECS HAVE BOTH INCENTIVES AND ABILITY TO IMPEDE COMPETITION FOR ADVANCED SERVICES.**

Incumbents offer two reasons why the Commission should refrain from removing entry barriers to the widespread deployment of advanced services: (1) that despite their control over the bottleneck facilities used to provide advanced services, incumbents have no advantage over entrants in the provision of those services, and (2) that implementation of the Act’s interconnection, collocation, and unbundling requirements will rob incumbents of their incentives to deploy new technologies and services. The first argument is refuted by the most basic principles of economic theory and by the record evidence – incumbents can and are using their control over the public network to thwart entrant attempts to offer advanced services. The

second argument has it exactly backwards. If the Commission follows through on its proposals to open local markets to competing advanced services providers, incumbents' incentives to deploy – which to date have been muted by concern over “cannibalization” of their other high margin monopoly retail services – will be significantly enhanced by the realization that if they do not deploy new electronics and services over the existing network, others will.

**A. Incumbent LECs' Control Of Bottleneck Local Facilities Gives Them Significant Market Power Over the Provision Of Advanced Services.**

Even aside from the fact that the Act's interconnection, collocation, and unbundling provisions apply by their terms to facilities used to provide advanced services, there is no legitimate economic rationale for excusing incumbents from their statutory obligations in this context. While the deployment of advanced services has only recently begun, the ILECs “still own and control the public network, they still have redoubtable market power, and they still have the expertise and the will to place countless obstacles in front of would-be competitors.”<sup>3</sup>

The incumbents argue that because they have themselves just begun offering xDSL services, they do not have market power.<sup>4</sup> But this argument confuses market power with market share. Market power is a firm's ability to sustain prices above competitive levels,<sup>5</sup> and

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<sup>3</sup> xDSL Networks, p. 3.

<sup>4</sup> See, e.g., GTE, p. 3 (“ILECs . . . are the newest among a multitude of rivals in a vigorously competitive market.”); BellSouth, p. 30 (“ILECs that provide DSL services do not possess market power in the advanced services market.”).

<sup>5</sup> See, e.g., American Tobacco Co. v. United States, 328 U.S. 781 (1946) (“the material consideration in determining whether a monopoly exists is not that prices are raised and (footnote continued on following page)

both the courts and the Commission have long recognized that control of bottleneck facilities is direct evidence of market power, regardless of market share.<sup>6</sup> Indeed, as discussed infra (p. 10), the fact that many incumbents have only recently begun to offer advanced services over xDSL technology that have been available for years through modifications to their existing networks, if anything, confirms the existence of market power – a strategy of slow-rolling the implementation of new technologies that compete with existing high margin services is a hallmark of market power. That market power will persist so long as incumbents can inhibit their potential competitors' access to the network facilities used to provide xDSL services.

GTE (p. 3) responds that “[t]he advanced services marketplace is vigorously competitive and does not rely on ILEC telephone networks for essential inputs.” GTE points to cable facilities.<sup>7</sup> The reality, however, is that GTE and other incumbents control the only

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(footnote continued from previous page)

that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so”).

<sup>6</sup> The Commission has consistently “treat[ed] control of bottleneck facilities as prima facie evidence of market power[.]” First Report and Order, Policy and Rules Concerning Rates for Competitive Common Carrier Servs. And Facilities Authorizations Therefor, 85 F.C.C.2d 1, 21 (1980); see also id. (“An important structural characteristic of the marketplace that confers market power upon a firm is the control of bottleneck facilities”); Memorandum Opinion, Order and Certificate, Application of Iowa Network Access Div. For Auth. Pursuant to Section 214 of the Communications Act of 1934 And Section 63.01 of the Comm’n’s Rules and Regulations to Lease Transmission Facilities to Provide Access Serv. to Interexchange Carriers, 3 FCC Rcd. 1468, 1469 (1988) (“One of the indicia of market power is the control of bottleneck facilities, with a concomitant ability to impede competition”).

<sup>7</sup> Id., pp. 3-4.

facilities that currently can support high speed, two-way data communications for the vast majority of U.S. homes and business. Many rural customers, for example, do not have one-way communications services such as cable or satellite television, but almost all do have telephones that can be converted into advanced services pipelines. Cable and wireless technologies may eventually support affordable, ubiquitous alternatives to the local loop for many customers – and AT&T, for one, is investing heavily to that end – but today the incumbent LEC facilities used to provide advanced services will remain bottleneck inputs for the provision of those services to most customers.<sup>8</sup>

Other incumbents claim in circular fashion that the availability of collocation space and unbundled loops eliminates their conceded “technical [and] economic advantages over new entrants in providing advanced services.”<sup>9</sup> It is certainly true that nondiscriminatory access to loops and to collocation space are necessary pre-conditions to meaningful competition. But it

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<sup>8</sup> See, e.g., U S WEST, p. 3 (acknowledging that loops and collocation are “essential inputs”). Even if the ILECs’ network facilities used to provide advanced services were not essential inputs, the Act would still mandate that they be provided to requesting carriers. As the Commission recently argued to the Supreme Court “the antitrust term ‘essential facilities’ does not appear anywhere in [the Act]. . . . As to most network elements, what the Commission must ‘consider’ is not whether the element is ‘essential,’ but whether deprivation of the element ‘would impair the ability’ of a requesting carrier ‘to provide the services that it seeks to offer.’” *FCC v. Iowa Utils. Bd.*, Reply Br. for the Federal Petitioners, p. 43 (filed June 17, 1998) (citing 47 U.S.C. 251(d)(2)(B)) (emphasis in original). In addition, the argument that advanced services-related equipment like packet switches are not essential elements because entrants can buy them from vendors (see, e.g., U S WEST, p. 8) ignores basic economics. That entrants can purchase their own local switches, for example, does not render the incumbent LEC’s local switches unessential. See *infra*, Section V.

<sup>9</sup> U S WEST, p. 3.

is equally true that incumbents do not today provide these inputs on a nondiscriminatory basis.<sup>10</sup> One central purpose of this proceeding is to strengthen interconnection, collocation, and unbundling requirements to discourage this anticompetitive conduct. Both through their conduct and their attempts to evade any regulation of that conduct, the incumbents confirm the need for the requirements proposed by AT&T and others.

**B. National Rules That Facilitate Nondiscriminatory Access to Collocation Space and Network Elements Will Enhance Advanced Services Innovation.**

Relying on essentially the same arguments that the Commission rejected two years ago in the local competition proceeding, incumbents contend that robust unbundling and resale requirements will, by forcing incumbents to share their “innovations,” create a disincentive for them to invest in the facilities needed to provide advanced services.<sup>11</sup> Precisely the opposite is true. As an initial matter, the incumbents’ own actions belie their contention that the prospect of competition destroys their incentives to invest in advanced service facilities. “Five of the six largest ILECs are already [offering xDSL services directly], and three of those carriers either initiated or expanded their offerings after the NPRM was released[.]”<sup>12</sup>

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<sup>10</sup> See, e.g., AT&T, pp. 13-15; MCI WorldCom, p. 79; MGC, pp. 39-44.

<sup>11</sup> See, e.g., U S WEST, p. 9 (“Forced sharing of innovations indisputably undercuts the incentives for all market participants to invest, and thereby retards the deployment of advanced services”).

<sup>12</sup> Sprint, p. 36 (emphasis added).

The reality is that incumbents have been too slow to promote advanced services because of the absence of the potential competition that nondiscriminatory access to the facilities used to provide advanced services would bring. xDSL technology is not new. HDSL and ADSL were invented in the early 1990s,<sup>13</sup> but the first major incumbent initiatives to offer advanced services using these technologies have come only this year – and only after a CLEC or cable operator has announced its intention to provide a similar service in the ILEC's service territory. Incumbents "have clear incentives to slow-roll high-bandwidth local loop capabilities . . . because these facilities cannibalize their existing higher margin retail offerings."<sup>14</sup> In other words, when an incumbent offers xDSL services, it competes with itself by attracting customers

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<sup>13</sup> The DSL Source Book: Plain Answers About Digital Subscriber Line Opportunities, 2d. pp. 12-19, "[http://www.paradyne.com/sourcebook\\_offer/index.html](http://www.paradyne.com/sourcebook_offer/index.html)."

<sup>14</sup> Qwest, p. 71.

away from existing services such as ISDN, T1, and second lines to homes.<sup>15</sup> It is no surprise, then, that incumbents have been slow to offer xDSL services.<sup>16</sup>

For this reason, by mandating nondiscriminatory access to the facilities used to provide advanced services, the Commission will strengthen, not weaken, incumbent incentives to innovate. Unlike monopolists who are protected from competition, incumbents and other firms in markets open to competition have a tremendous incentive to innovate rapidly. They innovate in order to (i) obtain a temporary jump on their competitors and (ii) protect themselves from their competitors' innovations.

Both factors apply here. First, an incumbent in a competitive market can always obtain a valuable jump on its competitors by moving first. Although entrants may eventually lease the network elements necessary to provide a similar service or resell the incumbent's retail offering, the incumbent almost always will enjoy a first mover advantage. During that period,

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<sup>15</sup> See also Ad Hoc, pp. 11-12 ("Given its potential to render their embedded circuit-switched networks obsolete, incumbents have little reason to embrace any policy that will speed the deployment of advanced services, and have every reason to resist policies that will diminish their control over the deployment of such services"); "Telco & Cable Internet Strategies: The Dawn of Carrier-class Access," 1997 Jupiter Strategic Planning Services/IT47, p. 31 ("Currently, the RBOCs have a stranglehold on high-speed Internet access via leased lines by virtue of their ownership of the local loop. The RBOCs will have little reason to invest in ADSL for business use until businesses have options for high-speed access besides leasing T1 and ISDN lines . . . . Moreover, high demand for second phone lines in the residential market – fueled in part by Internet access – provides a strong disincentive for RBOCs to offer ADSL to consumers, because ADSL offers simultaneous voice and data traffic").

<sup>16</sup> See also Qwest, p. 18 ("ILECs are always reluctant to allow competitors to use their last mile facilities. That is the problem that required the Bell System divestiture. That is the problem that required Congress to enact Section 251 in the first place").

the incumbent not only will face no price competition but has the opportunity to build its reputation with customers as a leader in advanced services. Second, if incumbents facing competition do not innovate and offer high quality advanced services, their competitors will. An entrant could lease capable loops, deploy its own advanced services equipment in the incumbent's central office, and offer services that leapfrog the incumbent's basic services. Thus, with entry barriers reduced, incumbents gain both offensive and defensive incentives to innovate and move quickly.

In fact, the effect potential competition will have on incumbent behavior is already evident. Now that some CLECs and cable operators have announced their intentions to provide some advanced services, incumbents finally have begun offering xDSL services. This is precisely what happened when the incumbents were first threatened with competition for video dial tone. They began announcing commitments to offer such services, but as "the threat of cable company entry into telephony diminished over time . . . so did the ILECs' commitment to deploying [video dial tone]."<sup>17</sup> Nor has the ILECs' dismal history in deploying advanced services been restricted to video dial tone. ISDN was a working technology for 20 years before the ILECs made it widely available.<sup>18</sup> Here too, incumbent incentives to innovate will disappear if the Commission does not open local markets with additional unbundling and collocation

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<sup>17</sup> Ad Hoc, p. 16.

<sup>18</sup> See Usage of the Public Switched Network by Information Service and Internet Access Providers, CC Docket No. 96-263, Comments of Internet Access Coalition, filed March 24, 1997, p. 23.



requirements. Hence, instead of rapidly innovating, incumbents will return to their historic practice of protecting their existing services by retarding the deployment of new ones. By contrast, “more competition in the provision of [advanced] services will only increase the urgency [the incumbents] feel to provide these services.”<sup>19</sup>

Incumbents nonetheless complain that because competition will constrain their advanced services profits, it must necessarily constrain their incentives to innovate.<sup>20</sup> To the contrary, as the Commission, state commissions and federal courts have all agreed, forward-looking cost-based pricing of network elements, interconnection and collocation, by replicating competitive market outcomes, provides the correct economic incentives for both incumbents and

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<sup>19</sup> Time Warner, p. 21.

<sup>20</sup> See Ameritech, p. 8.

entrants.<sup>21</sup> The normal profits available in competitive markets provide a reasonable return to investors and strong incentives for efficient innovation.<sup>22</sup>

Nor is GTE's intellectual property protection analogy apt.<sup>23</sup> The intellectual property laws are designed to encourage firms and individuals to undertake research and development activities that may not produce profitable results for many years. For example,

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<sup>21</sup> See, e.g., First Report & Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 and 95-185, FCC 96-325 ¶ 672 (rel. August 8, 1996) ("Local Competition Order"); GTE South Inc. v. Morrison, 6 F. Supp. 2d. 517, 524 (E.D. Va. 1998); Southwestern Bell Tel. Co. v. AT&T Communications Inc., No. A 97-CA-132-SS, at p. 19 (W.D. Tex. Aug. 31, 1998); accord TNS, p. 7; CWI, p. 13. Under TELRIC or other forward-looking economic pricing arrangements, the ILECs will have similar incentives to invest as a competitive firm. See Local Competition Order ¶ 679 ("Adopting a pricing methodology based on forward-looking, economic costs best replicates, to the extent possible, the conditions of a competitive market."); id. ¶¶ 686-689. ILECs' claim (e.g., Ameritech, p. 8) that they do not have an incentive to invest under such compensation schemes is tantamount to claiming that no competitive firm ever has an incentive to invest.

<sup>22</sup> The Commission should reject some ILECs' claim (e.g., Ameritech, p. 8) that TELRIC or other forms of forward-looking economic pricing are not fully compensatory and fail to provide investment incentives. First, the Commission has already concluded that TELRIC is fully compensatory and provides efficient investment signals for entrants and incumbents (see Local Competition Order ¶ 627, et seq.) and state commissions and federal district courts nationwide have echoed this finding. See also supra, n.21. Second, the ILECs' argument highlights their readiness to fault any reasonable pricing scheme. Since passage of the Act, ILECs have contended that they should be reimbursed for their "actual" or book costs. So long as they invest efficiently when deploying facilities to support advanced services, that is exactly what they will receive – plus a risk-adjusted rate of return on their investment. In other words, the forward-looking economic cost of efficient new investments should converge to the total book and capital costs of those investments so long as the ILECs are efficient. Thus, the ILECs' assertion that TELRIC is uncompensatory is nothing more than a thinly veiled attempt to protect their monopoly profits.

<sup>23</sup> See, e.g., GTE, p. 107.

patent protection assures drug companies that if they spend hundreds of millions of dollars to develop a new drug, another drug company cannot immediately manufacture the same product. Similarly, telecommunications equipment manufacturers may be rewarded for their technological innovations with patent protection for the new products they develop. Incumbents, on the other hand, want protection not for inventing revolutionary new equipment, but rather for marketing products using other companies' innovations. That would be like protecting from competition a drug store that is retailing a new product (in addition to giving the inventor of the drug a patent). In short, it is one thing to "acknowledge the importance of protecting and encouraging incentives and innovations,"<sup>24</sup> and quite another to seek, as the incumbents do here, to be immunized from competition. And here, of course, Congress made clear that it did not intend that incumbents be shielded from competition when it ordered them to unbundle their network elements and to allow resale of their retail services.

Finally, the incumbents' claims that cost-based interconnection, unbundling, and collocation will chill entrants' incentives to innovate are equally misplaced. Like incumbents, entrants will have a much greater incentive to invest in infrastructure and offer advanced services if the Commission expands and clarifies its existing loop, collocation, unbundling, and resale rules. An entrant has strong incentives to deploy its own facilities even when it can lease the incumbent's facilities instead. First, and most importantly, remaining dependent on a competitor

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<sup>24</sup> GTE, p. 107 (quoting Commissioner Powell).

leaves the entrant open to various forms of non-price discrimination. Small reductions in service quality, delays in provisioning, and even overt conduct making the maintenance on an entrant's leased loop a lower priority than the maintenance on loops retained by the incumbent all exacerbate the entrant's competitive disadvantages. Second, leasing network elements allows the entrant to build a customer base from which it can justify investing in advanced facilities of its own. In other words, unbundled loop access actually encourages facilities-based competition.<sup>25</sup> Third, an entrant's incentive to deploy facilities that support advanced services is even greater than its incentive to deploy equipment supporting only voice-grade service. Data technology is evolving rapidly and, as a result, companies like AT&T have every incentive to leapfrog their competitors by, for example, developing and deploying state-of-the-art packet switches and DSLAM-type equipment.

Thus, it is clear that "[a]dvanced services are most likely to reach all Americans if incumbents are subject to unbundling obligations to permit additional competitors to provide services. Absent the essential unbundling obligations, ILECs would not have the incentive through competition to invest in the provision of advanced services."<sup>26</sup>

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<sup>25</sup> See Local Competition Order, AT&T Comments at Appendix C, Affidavit of William J. Baumol, Janusz A. Ordover, Robert D. Willig ¶ 18 (filed May 16, 1996).

<sup>26</sup> CTSI, p. 12; see also RCN, p. 20; Sprint, p. 36; Qwest, p. 71; accord KMC Telecom, p. 24.

**II. THE COMMENTS BROADLY URGE THE COMMISSION, TO THE EXTENT IT ADOPTS THE SEPARATE-AFFILIATE PROPOSAL AT ALL, TO EXPAND AND STRENGTHEN THE PROPOSED SEPARATION REQUIREMENTS.**

The vast majority of commenters conclude, as does AT&T, that the NPRM's proposed separation requirements are wholly insufficient to justify a finding that the ILECs' advanced services affiliates are non-ILECs under § 251(h).<sup>27</sup> These commenters recognize that, without substantial additional separation obligations, the advanced services affiliate will operate simply as the ILEC's alter ego, with both the incentive, and the ability, to engage in concerted anticompetitive conduct. Indeed, many commenters stress that, absent complete divestiture, an ILEC and its affiliate will never be "truly separate," and the affiliate will never act "like any other CLEC,"<sup>28</sup> which are the fundamental (and appropriate) guideposts the Commission set out in the NPRM.<sup>29</sup>

**A. The Advanced Services Affiliate Described In The NPRM Is An "ILEC" Under Section 251(h).**

**1. The proposed advanced services affiliate is an ILEC "successor or assign."**

The majority of commenters recognize the broad reach of § 251(h)'s ILEC definition, and urge the Commission to give the ILEC "successor or assign" provision its

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<sup>27</sup> See, e.g., CompTel, pp. 14-33; ALTS, pp. 18-34; Qwest, pp. 22-50; TRA, pp. 30-37; MCI WorldCom, pp. 31-57; Level 3, pp. 4-6; xDSL Networks, pp. 1012; Mindspring, pp. 12-23; Time Warner, pp. 5-6.

<sup>28</sup> NPRM, ¶¶ 86-87.

<sup>29</sup> See, e.g., Level 3, pp. 4-6; MCI WorldCom, p. 41; Mindspring, p. 12; Qwest, p. 4; KMC, p. 10.

naturally expansive meaning.<sup>30</sup> Thus, CompTel reasons that “[a]n affiliate who obtains any advantage from its ILEC parent – including any transfer of assets, personnel or goodwill – qualifies as a ‘successor or assign’ under Section 251(h)(1)(ii),” and that “[w]hen an ILEC creates an affiliate with the same ownership and management, the affiliate is a ‘successor.’”<sup>31</sup> The ILECs, of course, argue for a narrow reading of the “successor or assign” provision, claiming variously that it applies only where the affiliate “replaces” the ILEC,<sup>32</sup> or merges with the ILEC, or obtains ownership from the ILEC of “key” local exchange and exchange access services and facilities,<sup>33</sup> or receives the “entire interest of the [ILEC] and the ILEC ceases operations.”<sup>34</sup>

At bottom, however, as the Commission already has found, there is no one definition of “successor or assign” that will apply in all legal contexts. Rather, the meaning of

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<sup>30</sup> See, e.g., CompTel, pp. 9-11; MCI WorldCom, pp. 11-16; Network Plus, pp. 3-6; Sprint, pp. 4-7; Florida Digital Network, p. 2; Westel, p. 4; TRA, pp. 13-16; McLeodUSA, pp. 2-4.

<sup>31</sup> CompTel, pp. 10-11 (emphasis in original). Similarly, MCI WorldCom notes that, even if the ILEC does not transfer any network elements to the affiliate (which plainly would make the affiliate an “assign”) any “affiliate that provide[s] advanced capabilities in [the ILEC’s] place would still be succeeding to its role.” MCI WorldCom, p. 13. See also Qwest, p. 23 (“any ILEC affiliate that owns local exchange network facilities, equipment, or capabilities is necessarily a ‘successor or assign’ of the ILEC under any common sense meaning of those terms”).

<sup>32</sup> Ameritech, p. 51.

<sup>33</sup> BellSouth, p. 38-39.

<sup>34</sup> Bell Atlantic, p. 26.

this provision must be based on the purpose of this provision and “the particular legal obligation” at issue.<sup>35</sup> Here, a central purpose of the “successor or assign” provision plainly is to bar ILECs from evading their obligations under § 251(c) – the section in which the ILEC definition appears – through a “corporate shell game.”<sup>36</sup> In other words, the ILEC cannot avoid these obligations simply by foregoing local network investment (whether involving enhancements or expansion) in its own name, and instead leaving all such investment (and assets) to an affiliated entity acting as the ILEC’s alter ego.

ILEC unbundling and resale obligations under § 251(c), a “cornerstone” of the Act,<sup>37</sup> are served only by interpreting “successor or assign” broadly, so as to ensure that movements of local exchange or exchange access functions, facilities, or services among corporate entities within the same ILEC corporate family have no effect on the application of § 251(c) to those functions, facilities, or services (and hence on their availability to all CLECs). Many commenters base their objections to the NPRM’s separate affiliate proposal on its undermining of these basic § 251(c) principles. Thus, the Florida Commission expresses great

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<sup>35</sup> NPRM, ¶ 104 & n. 202.

<sup>36</sup> CompTel, p11. That the “successor or assign” provision was focused on attempted ILEC evasions of their § 251(c) obligations is shown by the fact that the definition applies only to those “successors or assigns” that become such after the Act was enacted.

<sup>37</sup> NPRM, ¶ 73. The importance of § 251(c)’s obligations to the overall scheme of the Act cannot be overstated. The importance of these obligations is reflected, in part, by the fact that these obligations have no sunset date, and are included in one of only two sections (§ 271 being the other) placed beyond the Commission’s broad forbearance authority under § 10.

concern that the NPRM proposal will encourage ILECs to transfer facilities and investments so as to evade their § 251(c) obligations, concluding “that ILECs would seek ways to move all packet-switching facilities to an unregulated affiliate[,] ... ultimately includ[ing] Signaling System 7 or its successor.”<sup>38</sup> Similarly, the Indiana Commission and staff of the Wisconsin Commission conclude that the “NPRM provides RBOCs with an incentive to shift their most lucrative customers to packet-switched networks provided by an advanced services affiliate[, which] network can carry voice, data, and video faster and cheaper than the existing public switched network.”<sup>39</sup>

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<sup>38</sup> Florida, p. 6. The Indiana Commission and staff of the Wisconsin Commission similarly conclude (p. 11) that the ILEC may shift Signaling System 7 services to the unregulated affiliate. The concern that fundamental components of the current ILECs’ networks, like SS7 services, might fall in the hands of an unregulated advanced services affiliate is heightened by the fact that the Commission has not attempted in the NPRM to define in any detail the types of facilities and services that may properly be controlled by the affiliate, consistent with the Act. Plainly, the distinction cannot lie between circuit-switched versus packet-switched technology, because services based on each are rapidly converging.

<sup>39</sup> Indiana and Wisconsin, p. 11. These commenters also provide a stark example of how one ILEC, Ameritech, manipulated “ownership” of advanced services facilities to shield them (and their related services) from § 251(c). *Id.* at 7. Ameritech created an advanced services affiliate (“AADS”), which it identified as the owner of frame relay switches. This affiliate sells Ameritech switching services (at unknown contract rates), which Ameritech then combines with its own plant and sells back to the affiliate. The affiliate, in turn, resells these frame relay services to end users. *Id.* Through this “Byzantine relationship,” *id.*, Ameritech successfully has evaded its unbundling and resale obligations regarding these advanced services, claiming at various times that, because an affiliate was the “owner” of these frame relay switches, Ameritech was not obligated to allow CLECs to interconnect with them, and that, if it were called on to resell such frame relay switching services to CLECs, the resale rate would be the rate at which Ameritech paid the affiliate for these services, which Ameritech identified as its “actual cost.” *See Intermedia*, pp. 16-19. The relationship between Ameritech and this advanced services  
(footnote continued on following page)



Far from answering these concerns, the ILECs ignore them. The ILECs do not even suggest that their narrow interpretations of the “successor or assign” provision serve the purposes of § 251(c), and instead argue (wrongly) that such interpretations serve other interests under the Act, that is, the deployment of advanced services under § 706.<sup>40</sup>

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(footnote continued from previous page)

affiliate thus gave each the ability to engage in price squeezes as well as the ability to artificially inflate the costs underlying these services.

<sup>40</sup> See, e.g., *BellSouth*, pp. 21-22; *GTE*, pp. 34-39; *Ameritech*, pp. 57-58; *Bell Atlantic*, pp. 21-23. The ILECs no doubt will attempt to rely on a recent decision by a Connecticut district court, *MCI Telecommunications v. Southern New England Telephone Co.*, Civ. Nos. 97cv1596, 97cv1601 (Dist. Conn. Sept. 29, 1998), in support of their cramped interpretation of the “successor or assign” provision in § 251(h). In that Connecticut decision, the district court held that an affiliate could never be considered an ILEC under § 251(h)(1), even though it admittedly was a “successor or assign,” unless the affiliate also was a provider of local exchange service at the time of the Act’s enactment. *Id.*, slip op. at 29-30. This incredible conclusion – which even the ILECs have not proffered to date – effectively reads out the successor or assign provision altogether. Moreover, the decision is in direct conflict with the *Non-Accounting Safeguards Order*, ¶ 309, because, in the Connecticut court’s view, transfers of network elements to an affiliate would not make the affiliate subject to ILEC regulation except in the unlikely event that this affiliate also was a provider of local exchange service on February 8, 1996. The district court did not even consider the reasoning of the *Non-Accounting Safeguards Order*, let alone refute it. This Connecticut decision is plainly wrong, and is due no deference. If the Commission nonetheless chooses to follow this decision, it is imperative that a rulemaking be initiated on the appropriate scope of the “comparable” carrier provision in § 251(h)(2), which provides an independent basis for finding that an ILEC affiliate is subject to ILEC regulation, and which expressly was left undisturbed by the Connecticut court. *Cf.* *Indiana and Wisconsin*, p. 15 (“strongly recommend[ing] that the FCC undertake a rulemaking to adopt standards for when and how section 251(h)(2) ... could be applied to an advanced services affiliate”).

2. The proposed advanced services affiliate is a “comparable” carrier under section 251(h)(2).

As many commenters have established,<sup>41</sup> even ignoring the advanced services affiliate’s status as a “successor or assign,” the affiliate described in the NPRM would nonetheless be subject to ILEC regulation as a “comparable” carrier under § 251(h)(2). The Commission has sweeping authority to treat “comparable” local exchange carriers as ILECs, where the carrier “occupies a position in the market within area that is comparable to the position of [the ILEC],” has “substantially replaced” the ILEC, and “such treatment is consistent with the public interest.”<sup>42</sup>

Contrary to the suggestion of some ILECs, this comparable-carrier provision does not require that an affiliate supplant the ILEC for all services over the entire LATA before it becomes subject to ILEC regulation.<sup>43</sup> Indeed, such a formulation would allow an ILEC to avoid § 251(h)(2) altogether through the simple expedient of employing multiple affiliates within its LATA, each providing its own local exchange or access services within its own service area.

Instead, such ILEC treatment a comparable carrier is appropriate where an affiliate has received any exclusive benefits (such as use of the ILEC brand) owing to its corporate relationship with the ILEC (and thus is not “truly separate”) (from the ILEC), and provides local telecommunications services (here, advanced services) in the same LATA as the

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<sup>41</sup> See, e.g., CompTel, pp. 12-13; TRA, pp. 13-16; MCI WorldCom p. 16.

<sup>42</sup> Section 251(h)(2).

<sup>43</sup> See, e.g., Ameritech, p. 53.

ILEC. Under these circumstances, the affiliate occupies a market position “comparable” to the ILEC, because the affiliate is operating in the local telecommunications market utilizing ILEC benefits unavailable to its competitors. In addition, the affiliate has “substantially replaced” the ILEC because it is providing telecommunications services to customers that otherwise would have been served by the ILEC. Finally, such ILEC treatment for the affiliate would be fully consistent with the public interest because it furthers the market opening goals of the Act as well as deters ILECs from granting their affiliates discriminatory (and anticompetitive) benefits such that the affiliate could not be considered truly separate of the ILEC.<sup>44</sup>

**B. The Safeguards Required By Section 272 Are Wholly Insufficient To Justify Deeming An Affiliate A Non-ILEC.**

A significant majority of commenters, including the state commission commenters,<sup>45</sup> stress that the separation obligations under § 272 are wholly insufficient to justify deeming an affiliate a non-ILEC under § 251(h).<sup>46</sup> Many highlight the inability of any separation

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<sup>44</sup> See, e.g., CompTel, p. 12 (noting that, “when the affiliate uses its parent’s brand name, logo and other resources,” and thus is perceived “as the ILEC’s alter ego,” “it plainly occupies a comparable market position to the ILEC”); cf. Illinois, p. 4 (“[I]f advanced services affiliate is the sole provider of advanced services in a given market, such affiliate may be occupying a position in the market that is comparable to that occupied by an incumbent LEC.”).

<sup>45</sup> Notably, of the eight state commissions and staff that filed comments in this proceeding, six decline to support for the NPRM’s tentative conclusion that application of the proposed § 272 safeguards would justify exempting an ILEC advanced services affiliate from § 251(c).

<sup>46</sup> See, e.g., CompTel, pp. 20-22 (“the Section 272 restrictions are woefully inadequate”); Qwest, pp. 28-35; Nextlink, pp. 6-12; MCI WorldCom, pp. 35-38.

requirements (again, short of divestiture) to prevent ILECs and their affiliates from engaging in concerted anticompetitive conduct.<sup>47</sup> Thus, state commissions highlight the “many opportunities for the incumbent LEC and the advanced services affiliate to work in concert to stifle competition and maximize profits,”<sup>48</sup> and conclude that “[a]llowing ILECs to set up unregulated affiliates appears fraught with problems.”<sup>49</sup> Some commenters, like the Florida Commission, predict that ILECs will “devise ways to move facilities into these affiliate to escape regulation,” and note that, “[e]ven if rules are put in place to discourage [anticompetitive] activities . . . , violations are very difficult to discover and police.”<sup>50</sup>

These commenters correspondingly urge the Commission, if it does choose to sanction a separate-affiliate regime despite this likelihood of anticompetitive conduct, to broadly expand and strengthen the proposed separation obligations before allowing an ILEC affiliate to evade the unbundling and resale obligations of § 251(c).<sup>51</sup> For example, the Texas Commission

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<sup>47</sup> See, e.g., MCI WorldCom, pp. 18, 23 (“It is fanciful to think that the ILEC and its affiliate would operate in a truly independent fashion.”); Florida Digital Network, p. 2; Level 3, pp. 4-5; KMC, p. 10.

<sup>48</sup> Indiana and Wisconsin, p. 8.

<sup>49</sup> Florida, p. 6; see also *id.* (“Affiliate transactions rules are difficult to develop, and even more problematic to enforce.”). The Minnesota Commission (p. 4) similarly concludes “that the FCC’s proposals, as currently stated, tip the balance in favor of the incumbent LECs.”

<sup>50</sup> Florida, p. 6.

<sup>51</sup> See, e.g., Texas, p. 3; MCI WorldCom, pp. 38-55; CompTel, pp. 19-31; McLeodUSA, pp. 4-6; ICG, pp. 9-16; TRA, pp. 30-37; CWI, pp. 2-9.

calls on the Commission “to create stringent guidelines, in addition to those delineated,” before such an affiliate can be considered “truly separate from ILECs and . . . deserve the same treatment as other competitive carriers.”<sup>52</sup> Similarly, e.spire concludes that “the Section 272 model is insufficient to ensure the establishment and maintenance of truly independent advance service affiliates,” and emphasizes the need for “additional, more rigorous safeguards than those proposed in the NPRM.”<sup>53</sup>

These commenters repeatedly note that § 272 was intended to permit a BOC to operate a separate interLATA affiliate in a mature, highly-competitive interLATA market, with low barriers to entry, only after a BOC had opened its local market to competition by fully satisfying the requirements of § 271.<sup>54</sup> The § 272 model of separation, therefore, is inadequate for the proposed advanced services affiliate, which would offer a new type of service, with substantial barriers to entry, while the ILEC still maintains monopoly control over bottleneck facilities needed by the affiliate’s competitors (and prospective competitors) in that market.

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<sup>52</sup> Texas, p. 3. Even with additional restrictions, however, the Texas Commission recognizes that there is no “guarantee that the ILEC and the separate affiliate will not strategically work together.” Id.

<sup>53</sup> e.spire, p. 8; cf. FTC Staff Economists, p. 3 (recommending that the Commission “ensure it does not adopt weak separation rules . . . , [which] may thwart the development of a competitive advanced services market”).

<sup>54</sup> See, e.g., ALTS, pp. 7-9; CompTel, pp. 20-22; Time Warner, pp. 10-11; Florida Digital Network, p. 3; MCI WorldCom, pp. 19-20.

The ILECs, in contrast, claim that the section 272 obligations are too restrictive, arguing that they create inefficiencies and require duplications of effort and facilities, which will undermine investment in advanced services by not allowing ILECs “to capitalize on economies of scale and scope.”<sup>55</sup> As shown above, supra p. 10, these claims lack factual or theoretical support. In any event, the option of employing an advanced services affiliate is purely voluntary, and nothing in the NPRM precludes an ILEC from providing advanced services fully integrated with its existing local exchange and exchange access services, taking advantage of all economies of scale and scope, but still subject to the mandated unbundling and resale obligations of § 251(c). The ILECs’ real complaint thus is not with the NPRM, but with the Act itself, which is the source of their unbundling and resale obligations, and which they cannot evade by simply placing telecommunication facilities and services in the name of an affiliate.

Each of the various lesser separation standards advocated by the ILECs is inadequate under the Act for the same fundamental reason: they allow for a level of integration between the ILEC and affiliate – concerning administration, marketing, planning, employment, and property – that cannot be squared with the statutory requirement that an ILEC affiliate, to evade ILEC obligations, must operate independently from the ILEC and without advantages

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<sup>55</sup> GTE, p. 9; see also, e.g., Bell Atlantic, p. 18 (asserting that separate affiliate requirements “will impose unnecessary costs and inefficiencies that will delay broad scale deployment” of advanced services); BellSouth, p. 13 (arguing that a separate affiliate regime will “divert resources” that will “delay substantially and curtail further ILEC deployment of advanced services”) Cincinnati Bell, pp. 6-7 (affiliate proposal “does not result in an efficient use of resources”).

owing to its corporate relationship with the ILEC.<sup>56</sup> Indeed, there is no rational basis for imposing lesser separation standards than the already inadequate standards of § 272 – given that the NPRM anticipates a competitive local market setting that does not currently exist and could only justify more separation requirements than § 272, not fewer. Significantly, not one of the state commission commenters advocates restrictions on the advanced services affiliates that fall below the baseline set by § 272, and, as discussed supra (pp. 23-24 and n.45), most call for much stricter separation standards.

**C. Comments On The NPRM's Proposed Restrictions And Safeguards.**

1. ILECs and their affiliates must establish compliance with the separation requirements before they may provide advanced services.

Commenters broadly call on the Commission to require that the ILECs and their advanced services affiliates, before they begin providing advanced services, establish that they have complied and will comply with all separation and disclosure obligations imposed by the Commission.<sup>57</sup> For example, the California Commission states that the ILECs and their affiliates should be required to submit “verifiable documentation addressing each component of the structural and transactional requirements, as well as the nondiscrimination requirements,” and that “[o]perational independence should be clearly demonstrated, beginning from the planning

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<sup>56</sup> See supra p. 18 (discussing broad scope of ILEC definition).

<sup>57</sup> See, e.g., ALTS, p. 27; CompTel, pp. 16-18; Qwest, p. 4; Westel, p. 6 n.11; Nextlink, p. 11; KMC, p. 10; TNS, p. 6; Allegiance, p. 24; MCI WorldCom, p. 49.

stages of the affiliate's operations and the formation of the organization, continuing through the time the affiliate applies for authority to become a telecommunications provider."<sup>58</sup> The Indiana Commission and staff of the Wisconsin Commission similarly call on this Commission to undertake an inquiry similar to the section 271 application and review process "before granting any RBOC advanced services affiliate non-incumbent LEC status."<sup>59</sup>

The critical need for such review before an ILEC and affiliate are authorized to provide advanced services exempt from § 251(c) is shown by fact that, according to the Indiana Commission and others, ILECs already are providing advanced services through affiliates and claiming exemption from the unbundling and resale rules.<sup>60</sup> Plainly, given the ILECs' failed implementation of the section 272 obligations,<sup>61</sup> and their permissive interpretation of what

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<sup>58</sup> California, p. 5.

<sup>59</sup> Indiana and Wisconsin, pp. 10-11.

<sup>60</sup> Indiana and Wisconsin, p. 7 (describing Ameritech's provision of frame relay services through an affiliate); Intermedia, pp. 16-19 (same).

<sup>61</sup> AT&T's opening comments detailed the many ways in which ILECs have avoided and defied their section 272 obligations. AT&T, p. 11-17. Since the filing of the opening comments, the Commission has issued an order denying BellSouth Louisiana's second § 271 application, which order concludes that BellSouth continues not to satisfy the requirements of § 272. Memorandum Opinion and Order, Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, FCC 98-21, ¶¶ 320-360 (rel. Oct. 13, 1998). Similarly, the staff of the California Commission recently issued its final staff report in the ongoing section 271 proceedings concerning Pacific Bell that concludes that Pacific Bell still is not complying with the separate affiliate requirements in section 272 and this Commission's orders. California Public Utilities Commission Telecommunications Division Final Staff Report, Pacific Bell (U 1001 C) and Pacific Bell Communications Notice of Intent to File Section 271 (footnote continued on following page)



constitutes appropriate “separation” in the present proceeding, the Commission cannot simply rely on paper promises of compliance. This approval process, however, although necessarily rigorous, need not be onerous, and could be accomplished (with public comment) within 90 days.

2. To be truly separate, an affiliate must have substantial independent equity ownership.

A large number of commenters stress that independent equity ownership is a critical component of any truly separate advanced services affiliate.<sup>62</sup> Besides complete divestiture,<sup>63</sup> commenters suggest specific outside-ownership requirements ranging from over 20 percent to over 50 percent.<sup>64</sup> These commenters show that, without meaningful levels of

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Application For InterLATA Authority in California, (“California Staff Final Report”) at 6, 143-155 (issued October 5, 1998).

<sup>62</sup> See, e.g., ALTS, pp. 18-21 (recommending that in-region data affiliates have “appreciable outside ownership”); MCI WorldCom, p. 41 (advocating “a sizable amount of independent ownership, free of any ILEC influence or control”); e.spire, p. 12 (advocating “substantial percentage” of outside ownership); Covad, pp. 60-61.

<sup>63</sup> Mindspring, p. 12 (“Only full separation through divestiture would eliminate ILEC incentives to discriminate in the Internet services market.”); MGC, p. 35 (calling for “divestiture of ILECs into separate retail and wholesale organizations”); Level 3, pp. 4-6; KMC, p. 10; Qwest, pp. 38-39.

<sup>64</sup> CompTel, p. 23 (recommending at least 40 percent independent ownership); Westel, p. 9 (same); ICG, p. 10 (recommending at least 20 percent independent ownership). As explained by CompTel and LCI, “Because its shares would be owned and publicly traded by persons and institutions expecting to earn profits from [the affiliate’s] operations without regard to [its affiliation with the parent or the local operations entity], market pressures would help give the retail affiliate stronger incentives to earn a reasonable return on investments.” CompTel, p. 23 (quoting Petition of LCI International  
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independent ownership, the advanced services affiliate will serve simply as an alter ego of the ILEC, pursuing the best interests of the ILEC and their common parent (through price squeezes and other anticompetitive conduct) even when such conduct is against the affiliate's own corporate self-interests. Mandating outside ownership (along with guaranteed board representation for these outside owners) is necessary to create incentives within the affiliate (arising from fiduciary duties to the outside shareholders)<sup>65</sup> to act like a profit-maximizing CLEC, rather than only as an extension of the ILEC.<sup>66</sup>

3. An ILEC advanced services affiliate should be barred from providing service via resale.

Many commenters have echoed AT&T's call in its opening comments for a bar on an advanced services affiliate providing service via resale.<sup>67</sup> These comments note that an

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Telecom Corp. for Expedited Declaratory Rulings, CC Docket 98-5, at 17 (filed Jan. 22, 1998)).

<sup>65</sup> See, e.g., D. Block, N. Barton, & S. Radin, The Business Judgment Rule: Fiduciary Duties of Corporate Directors, at 185 (4<sup>th</sup> ed., Prentice Hall 1994) (noting that, while a wholly-owned subsidiary must act in the best interests of the parent, a corporation with partial outside equity ownership will owe fiduciary duties to the minority shareholders).

<sup>66</sup> For these same reasons, AT&T agrees with the recommendation of commenters stating that the pay structure for the directors, officers, and employees of the affiliate should not be tied in any way to the performance of the ILEC or its parent. MCI WorldCom, p. 41; TRA, p. 36; ICG, p. 11. Otherwise, these directors, officers, and employees will be encouraged to pursue the economic best interests of the ILEC or common parent, rather than the best interests of the affiliate.

<sup>67</sup> See, e.g., CompTel, pp. 24-27; e.spire, pp. 18-19; ICG, pp. 14-15; Westel, pp. 7-8; KMC, p. 9.

underlying justification for exempting the ILEC from § 251(c) – to encourage ILECs to provide favorable interconnection terms available to all CLECs – would not be served through the affiliate's provision of resold ILEC services.<sup>68</sup> Indeed, this goal would be affirmatively disserved, because ILECs and their affiliates will inevitably choose to provision services via resale if that option exists, and the affiliate would have no incentive even to seek the best resale rates.<sup>69</sup>

Resale presents the ILEC and its affiliate with the opportunity to engage in a classic price squeeze, because the ILEC has bottleneck control over essential inputs to advanced telecommunications services. Indeed, the ability to resell ILEC services through an advanced services affiliate would provide an ILEC with a much more powerful means of engaging in a price squeeze than if it provided such services itself on an integrated basis. This is because retail price reductions offered by an ILEC are automatically passed on to CLECs through the whole discount provision (§ 251(c)(4)(A)), but the same price reductions through a non-ILEC affiliate would be shielded from this wholesale discount. The ILEC and affiliate working together, therefore, unlike the ILEC operating alone, could effectively engage in a price squeeze to squeeze out resale competitors, without reducing the wholesale rate available to these competitors.

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<sup>68</sup> See CompTel, pp. 24-25; e.spire, p. 18.

<sup>69</sup> AT&T, pp. 29-30.

Resale thus provides the affiliate with inherent and exclusive advantages in the advanced services market that are due entirely to its relationship with the ILEC. Under these circumstances, an affiliate would be “deriv[ing] unfair advantages from the incumbent LEC,” and thus necessarily be deemed an ILEC under § 251(h).

**D. Comments On Proposed Restrictions On Transfers Between ILECs And Their Advanced Services Affiliates.**

**1. Transfers of advanced services facilities will in all cases render an affiliate an “assign” of the ILEC.**

The commenters overwhelmingly condemn the NPRM’s proposal to allow ILECs to make “de minimis” transfers of advanced services facilities to the affiliate without the affiliate being considered an assign.<sup>70</sup> Indeed, many commenters object to the ILEC being allowed to transfer any assets to the advanced services affiliate, not just transfers of network elements.<sup>71</sup> As AT&T discussed in its initial comments,<sup>72</sup> the Commission currently is without regulatory forbearance authority under section 10 to create such a de minimis transfer exception to the rule previously announced in the Non-Accounting Safeguards Order.

Nor would any such de minimis transfer exception make sense as a matter of policy. Contrary to the claims of the ILECs, prohibiting the transfer of such facilities would not

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<sup>70</sup> See, e.g., TRA, p. 34; CWI, p. 6; Network Plus, p. 5; US Xchange, p. 4; Westel, p. 12; xDSL Networks, p. 11; MCI WorldCom, p. 54; ICG, p. 13; Nextlink, pp. 9-10; KMC, pp. 4-5; Hyperion, pp. 5-6; Transwire, pp. 19-20.

<sup>71</sup> CompTel, p. 33; e.spire, p. 20; Mindspring, p. 5.

<sup>72</sup> AT&T, p. 33.

“penalize” ILECs that already have deployed advanced services,<sup>73</sup> or require unnecessary “duplication of existing assets,”<sup>74</sup> or result in unfairness to ILECs who bought these assets believing they would be “unencumbered by the whole panoply of new rules proposed in this NPRM.”<sup>75</sup> There is no “penalty” in requiring that ILECs follow the dictates of § 251(c)’s unbundling and resale requirements for facilities purchased with regulated revenues to enhance the capabilities of their loops.

A blanket no-transfer rule also does not require any “duplication” of facilities. An ILEC that chooses to leave the advanced-services business, and instead “centralize [its] advanced services offering” in the affiliate,<sup>76</sup> can do so simply by selling its existing advanced service facilities in the market to nonaffiliates. Or an ILEC that chooses to stay in the advanced services business could deploy its affiliate’s facilities elsewhere so that their service areas do not overlap.

Finally, there is no unfairness in such a no-transfer rule. ILECs have purchased and deployed advanced services facilities, using regulated revenues, in response to competition by CLECs. At the time these purchases were made, there was no reasonable basis for concluding that these facilities – enhancements to the local loop similar to existing ISDN services – would not be subject to the unbundling and resale requirements of section 251(c), as among the

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<sup>73</sup> Ameritech, p. 57; U S WEST, p. 29.

<sup>74</sup> SBC, p. 6; see U S WEST, p. 29.

<sup>75</sup> GTE, p. 48.

<sup>76</sup> BellSouth, p. 43.

features, functions, and capabilities of the local loop.<sup>77</sup> Moreover, the ILECs themselves recognize that a no-transfer rule would not unfairly delay or deny their affiliates' entrance into this market, as they repeatedly state that such advanced services facilities are "readily available."<sup>78</sup>

2. A truly separate affiliate cannot be clothed in the ILEC's brand

AT&T agrees with the numerous commentators who concluded that an advanced services affiliate should be barred from using the ILEC brand.<sup>79</sup> It should be axiomatic that an ILEC affiliate cannot be deemed to "function[] just like any other competitive LEC,"<sup>80</sup> if it comes to the market clothed in ILEC's brand.

Other than their bottleneck network facilities themselves, perhaps the most valuable asset held by any ILEC is their company name and logo. Indeed, the Commission has repeatedly cited the ILECs' strong brand recognition as a significant advantage an ILEC has in the local exchange over most other CLECs,<sup>81</sup> and a substantial reason why BOCs will be

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<sup>77</sup> That the ILECs understood that such advanced services would be subject to section 251(c) was made clear in their section 706 petitions earlier this year, which requested that this Commission forbear from applying section 251(c) to such advanced services.

<sup>78</sup> See, e.g., GTE, p. 43, U S WEST, pp. 7-8.

<sup>79</sup> See, e.g., MCI WorldCom, p. 41; CompTel, p. 34; e.spire, p. 9; Qwest, p. 4; ICG, p. 14; ALTS, p. 32-33; xDSL Networks, p. 10; McLeodUSA, p. 5; TRA, p. 35; Network Plus, p. 5; KMC, p. 7; CIX, p. 15; Supra, p. 3; US Xchange, p. 5.

<sup>80</sup> NPRM, ¶ 92.

<sup>81</sup> See Bell Atlantic/NYNEX Merger Order, ¶84 ("brand recognition and reputation in the relevant markets ... are critical assets for offering services to the mass market"); id. ¶ 132 (footnote continued on following page)

formidable competitors in the interLATA market once section 271 approval is granted.<sup>82</sup> Any transfer of this brand to the advanced services affiliate is inherently discriminatory – as no ILEC would make its brand equally available to other CLECs – and thus cannot be squared with the fundamental nondiscrimination obligation that an affiliate not receive goods, services, facilities, or information that are not equally available to nonaffiliates. Moreover, as pointed out by the Federal Trade Commission staff economists, without a ban on the affiliate’s use of the ILEC’s name or logo, the ILEC will have an incentive to overinvest in building its reputation, “resulting in harmful effects in both the regulated and unregulated markets,” because by doing so it “enhance[s] the reputation of both it and its affiliates.”<sup>83</sup>

The ILECs assert that their affiliates should be allowed to use the ILEC brand because the brand is not an element CLECs require to provide competitive service,<sup>84</sup> and because “common branding” should be encompassed within their joint marketing activities.<sup>85</sup> As this

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(identifying “a high value on brand name reputation for providing quality services,” as one of the substantial barriers to entry in the local telecommunications markets).

<sup>82</sup> See Ameritech Michigan Order, ¶ 15 (“[G]iven the BOCs strong brand recognition and other significant advantages from incumbency, advantages that will particularly redound in the broad-based provision of bundled local and long distance services, we expect that the BOCs will be formidable competitors in the long distance market ...”).

<sup>83</sup> FTC Staff Economists, p. 4. The comments note further that such overinvestment in reputation amounts to improper cross subsidization, and “may be done in ways that are difficult for regulators to detect and prevent.” Id.

<sup>84</sup> BellSouth, p. 44.

<sup>85</sup> SBC, p. 6.

Commission has made clear, however, the nondiscrimination requirement applies to every transfer between the ILEC and affiliate, not just to transfers involving network elements required to provide service.<sup>86</sup> Moreover, as many commenters have stressed,<sup>87</sup> the ILECs and advanced services affiliates must be barred from all joint marketing activities, let alone joint marketing that includes common branding.<sup>88</sup>

3. CLECs must be barred from favoring affiliates by providing them intellectual property rights that are not also made available to CLECs.

AT&T's opening comments stressed that, insofar as an ILEC advanced services affiliate obtains the right to access intellectual property embedded in a UNE, CLECs necessarily must be able to obtain that UNE on the same terms and conditions.<sup>89</sup> Similarly, the Texas Commission has noted its "concern[]" about transfers of intellectual property and proprietary

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<sup>86</sup> See Non-Accounting Safeguards Order, ¶¶ 216-218 (holding that nondiscrimination requirement "extends to any good, service, facility, or information that a BOC provides to its section 272 affiliate," is "unqualified," and will be "construe[d] ... broadly to prevent BOCs from discriminating").

<sup>87</sup> See infra, Section II.D.4.

<sup>88</sup> ILECs no doubt shall claim that it is unfair to bar them from making full use of their brand, which cannot be characterized as a bottleneck facility to the local exchange market, because all CLECs have an opportunity to develop their own brands and many (such as the major IXCs) themselves already have brands of enormous value. Yet the nondiscrimination requirement does not restrict the ILEC to utilize fully its brand; what it bars is the ILEC from transferring that brand to an affiliate and still having that affiliate considered "truly independent," such that it is shielded from the ILEC's statutory obligations under section 251(c). Indeed, the ILEC's brand is no different than any other ILEC asset in the sense that it was paid for by ratepayers in a regulated market.

<sup>89</sup> AT&T, p. 37.



technology to the advanced services affiliate.”<sup>90</sup> Since the filing of the opening comments in this proceeding, the staff of California Commission also has concluded that, when an ILEC sells a UNE to a CLEC, it should “negotiate any necessary [right to use] agreement for use of the software that parallels that in its own agreement with the vendor.”<sup>91</sup> Moreover, the staff concluded that the ILEC “should not charge CLECs for negotiations or the [right to use] fees.”<sup>92</sup>

Significantly, the ILECs have ignored this important issue in their comments. It is critical that the Commission, consistent with the recent California staff conclusions, make clear that nondiscrimination requirements extend to any intellectual property embedded in UNEs, and thus that ILEC affiliates cannot receive intellectual property rights with UNEs purchased from the ILEC that differ in any way from the rights provided to CLECs.

4. An ILEC advanced services affiliate should not be allowed to jointly market its services with the ILEC, or to obtain discriminatory access To CPNI

AT&T supports the determination of the substantial number of commenters that ILEC affiliates cannot be considered truly separate of the ILEC unless they are barred from engaging in joint marketing and are not allowed discriminatory access to the ILECs’ CPNI.<sup>93</sup>

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<sup>90</sup> Texas Commission, p. 4.

<sup>91</sup> California Public Utilities Commission Telecommunications Division Final Staff Report, Pacific Bell (U 1001 C) and Pacific Bell Communications Notice of Intent to File Section 271 Application For InterLATA Authority in California, (“California Staff Final Report”) at 98 (issued October 5, 1998).

<sup>92</sup> California Staff Final Report, at 98.

<sup>93</sup> See, e.g., Minnesota, p. 16 (concluding that “transfers of customer accounts and CPNI, as well as joint marketing, should make an incumbent LEC’s advanced services affiliate an  
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As with transfers involving the ILEC's brand, it is inconceivable that any joint marketing arrangements can be entered into by the ILEC and its affiliate that are not discriminatory, because the same joint marketing opportunities cannot realistically be extended to nonaffiliated CLECs. Moreover, the joint marketing envisioned by the ILECs would involve integrating their marketing operations, as well as their product design and development, which integration cannot be squared with the requirement that the ILEC and affiliate operate independently.<sup>94</sup>

Some ILECs argue that because section 272 provides a limited joint-marketing exception to the general rules of independent operation and nondiscrimination, so too should this Commission craft such an exception for an advanced services affiliate.<sup>95</sup> As has been shown by numerous commenters, however, section 272 affiliates will operate in an entirely different

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assign"); CompTel, p. 27-28; e.spire, p. 9, 14; Qwest, p. 4; MCI WorldCom, p. 48; Westel, p. 11; see also FTC Staff Economists, pp. 4-5 (noting that the Commission "may wish to impose restrictions on joint marketing activities between the LEC and affiliate to prevent harmful discrimination").

<sup>94</sup> SBC asserts that the following is included within "joint marketing": "common branding, discounts on mixed packages of services, joint and aggregate billing, a single point of contact for sales and service, joint customer care, customer proprietary information ('CPNI') treatment like that permitted with section 272 affiliates." SBC, p. 6. Similarly, in its recent section 271 application, BellSouth stated that, as part of its "joint marketing" with its section 272 affiliate, it will assist the affiliate in the "development and creation of packages of local and long distance services offered on an integrated basis." BellSouth Second § 271 Application, Cochran Aff. ¶ 30. Even section 272's joint marketing authority, however, does not encompass this type of "planning, design, and development" of the affiliate's offerings. Non-Accounting Safeguards Order ¶ 296.

<sup>95</sup> SBC, p 6.

market setting than is in store for advanced services affiliates, and different restrictions on advanced services affiliates thus are justified.<sup>96</sup> The ILECs simply have provided no basis to extend section 272's carefully crafted exception to the otherwise applicable blanket rule of nondiscrimination (which enhances the section 272 affiliate's ability to enter the highly-competitive long distance market), into a market setting where no such exception is warranted.

Similarly, there is no justification for creating an exception to the nondiscrimination rule to allow the affiliate, while still maintaining its non-ILEC status, access to CPNI under terms or conditions different from that available to other CLECs.<sup>97</sup> The discriminatory transfer of CPNI from an ILEC to its advanced services affiliate makes the affiliate an ILEC within the meaning of § 251(h).<sup>98</sup>

Moreover, that such a transfer makes the affiliate an ILEC under § 251(h) and thus subject to ILEC regulation, is not inconsistent with the Commission's CPNI Order issued earlier this year. In that Order, the Commission held that affiliated entities of an ILEC, including section 272 affiliates, are permitted to share CPNI pursuant to section 222, despite the fact that

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<sup>96</sup> The section 272 affiliate will compete in a mature interLATA market with established competitors only after the ILEC has established that its local exchange is fully and irreversibly opened to competition. The proposed advanced services affiliate, however, would face no long-established competitors, and would be providing service before the ILEC has opened its local exchange to competition. See comments cited supra n.53.

<sup>97</sup> See CompTel, pp. 29-31 ("No independent provider can hope to match the advantage that could be derived from mining the ILECs' massive CPNI for advanced service customers."); MCI WorldCom, p. 48; e.spire, p. 14; Northpoint, p. 33; Westel, p. 11.

<sup>98</sup> See supra, p. 44.

CLECs do not have the same access to this information.<sup>99</sup> Here the issue is not whether the ILEC is permitted to transfer CPNI to the affiliate (which, under the CPNI Order, in can), but rather whether such a transfer has the effect of transforming, under § 251(h), the affiliate from a non-ILEC into an ILEC “successor or assign” or “comparable” carrier. Thus, the ILEC is not barred from providing discriminatory CPNI access to the advanced services affiliate (as it would be with a section 272 affiliate if the nondiscrimination rules applied). Instead, such transfers are permitted, but the necessary consequence is that the affiliate (which would no longer be operating like any other CLEC) would no longer be due an exemption from § 251(c).

5. All ILECs, small or large, should face the same separation requirements.

A number of commenters rightly conclude that small ILECs should be subject to the same separation requirements as the large ILECs.<sup>100</sup> Claims to the contrary – by smaller ILECs, their trade associations, as well as the Small Business Administration – wrongly presume, first, that an ILEC cannot exert monopoly power unless it is large, and second, that an ILEC cannot profitably enter the advanced services market without being shielded from § 251(c).

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<sup>99</sup> AT&T believes this aspect of the CPNI Order – which reversed part of the Commission’s earlier Non-Accounting Safeguards Order – was wrongly decided, and has requested its reconsideration, because it authorizes BOCs to discriminate in favor of their section 272 affiliates in violation of section 272’s nondiscrimination requirements.

<sup>100</sup> See, e.g., Intermedia, pp. 13-14; CWI, p. 8; Rhythms, p. 19; First Regional, pp. 19-20.

As the Commission already has found, small independent ILECs possess incentives and abilities to engage in anticompetitive conduct.<sup>101</sup> Their market power arises from their control over bottleneck telecommunications facilities. In addition, as has been demonstrated above, application of § 251(c) by no means precludes profitable deployment of advanced services.<sup>102</sup>

Most telling in the small ILEC comments, however, is the acknowledgment that “most rural incumbent LECs are presently exempt from the unbundling requirements of section 251(c),” pursuant to § 251(f).<sup>103</sup> The procedures under the Act for small ILECs to seek protection from § 251(c), therefore, are working, and the Commission should not impose weakened separation requirements on the advanced services affiliates for those ILECs that do not qualify for relief under § 251(f).

### **III. THE COMMISSION SHOULD PROMULGATE NATIONAL LOOP AND OSS RULES THAT PROMOTE THE AVAILABILITY OF ADVANCED SERVICES.**

Virtually all commenters agree that nondiscriminatory access to local loops is essential.<sup>104</sup> That is because “[i]n order for CLECs to provide any telecommunications service,

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<sup>101</sup> Second Report and Order, Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, 12 FCC Rcd 15756 ¶¶ 159-61 (released April 18, 1997).

<sup>102</sup> See *supra* n.22.

<sup>103</sup> NTCA, p. 4.

<sup>104</sup> See, e.g., TNS, p. 7; xDSL Networks, p. 4; RCN, p. 15; CTSI, p. 10; ITA, pp. 17-18; e.spire, p. 39; Qwest, p. 63; California, pp. 1-2; IAC, p. 20; TRA, p. 42; AT&T, p. 39.

advanced or basic, CLECs must have access to the monopolist's bottleneck local loop."<sup>105</sup> Nondiscriminatory access is not available today. To the contrary, incumbents continue to use their control of bottleneck facilities to discriminate against competitors and to thwart competition. For example, incumbents "frequently claim that conditioned loops are unavailable or that technical constraints prevent them from meeting the customer's transmission specifications, even when the RBOC or its affiliate is advertising the availability of ISDN or xDSL service in the same market."<sup>106</sup>

The "adoption of uniform [loop] standards would further encourage the deployment of advanced services by increasing predictability and certainty."<sup>107</sup> In this regard, what GTE (p. 11) characterizes as "proposals to expand ILEC unbundling obligations" are, in fact, straightforward applications of the Act's requirements and the Commission's existing rules. Absent express clarification to this effect by the Commission, however, GTE and other incumbents will – in pursuit of delay – challenge the unbundling of facilities used to provide advanced services before every state commission. As MCI WorldCom (p. 71) properly

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<sup>105</sup> Network Plus, p. 10.

<sup>106</sup> Level 3, p. 15 (emphasis in original); see also MCI WorldCom, p. 79 ("In the absence of national rules governing the treatment of DLC loops, ILECs have successfully prevented competitors from obtaining access to DLC loops at any technically feasible point").

<sup>107</sup> CTSI, p. 10; see also TNS, p. 7; KMC, p. 19; MCI WorldCom, pp. 62-63; Paging Network, p. 15; RCN, p. 15; CTSI, p. 10; Sprint, p. 19; PSINet, p. 2; CWI, p. 13; Allegiance, p. 7; e.spire, p. 33; Transwire, pp. 33-34; ICG, pp. 27-28; Illinois, p. 13 (as a minimum); Qwest, p. 58; US Xchange, LLC, p. 9; McLeod USA, pp. 8-9; TRA, p. 42; Intermedia, p. 45; ALTS, p. 56; accord IAC, p. 19.

concludes: "it is now more important than ever to adopt and enforce national rules to ensure that ILECs provide nondiscriminatory access to this critical bottleneck element of their networks."<sup>108</sup>

**A. It Is Technically Feasible For ILECs To Unbundle Basic Loops, xDSL Capable Loops, And xDSL Equipped Loops.**

As AT&T explained in its opening comments, the Commission should define three additional loop types: the basic loop, the xDSL capable loop, and the xDSL equipped loop. Each of these definitions is consistent with the Commission's current local loop definition, but collectively they include the additional flexibility necessary to encompass loops supporting advanced services.<sup>109</sup> It is increasingly the case, for example, that a local loop does not terminate on the main distribution frame in a central office. AT&T's proposed definitions account for the fact that a loop supporting advanced services splits the communications into separate data and voice streams, where each stream terminates individually in an entrant's collocation space, at another unbundled network element, or on the incumbent's network.<sup>110</sup> MCI WorldCom and

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<sup>108</sup> With the exception of some ILECs, the commenters also widely agree that the Commission should adopt standards for electrical equipment placed on the central office side of the local loop. See, e.g., KMC, p. 21; SBC, p. 42; Sprint, p. 26; PSINet, p. 10; Allegiance, p. 9; SBA, pp. 9-10; e.spire, p. 37; Transwire, pp. 36-37; ICG, p. 31; Qwest, p. 62; UTC, p. 37; Supra, p. 16; ALTS, p. 62; accord Paradyne, p. 52.

<sup>109</sup> AT&T, pp. 46-50.

<sup>110</sup> Id., n.87; see also Local Competition Order ¶ 297 ("we will treat local loops with a particular type of conditioning as distinct elements that are different from loops with other types of conditioning").

ALTS provide similar local loop descriptions,<sup>111</sup> and virtually all commenters support the availability of basic and xDSL capable loops.<sup>112</sup>

AT&T also demonstrated (pp. 51-53) that generally accepted industry standards support rebuttable presumptions that loops of particular lengths can support advanced services at specified data transmission speeds. The Commission should, for example, establish the rebuttable presumptions that capable loops will support the advanced services and transmission speeds AT&T identified in its initial comments.<sup>113</sup> Incumbents offer no specific evidence of technical feasibility, but attempt to shift the burden of proving feasibility to entrants.<sup>114</sup> But both the relevant facilities and the relevant information are in the hands of the incumbents, and thus incumbents should have the burden to point to industry spectrum management standards (or other industry accepted factors) that prevent a requested loop from achieving minimum performance levels. Shifting that burden and requiring entrants, on a loop-by-loop basis, to

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<sup>111</sup> See MCI WorldCom, p. 82 (an xDSL equipped loop is “an element that includes the copper, the fiber and the electronics that make it possible for the loop to provide broadband services.”); ALTS (Attachment – “Economics and Technology of Broadband Deployment,” pp. 86-87).

<sup>112</sup> See, e.g., KMC, p. 19; IAC, p. 20; MCI WorldCom, pp. 71-72; Network Plus, p. 10; TEC, pp. 7-8; GTE, p. 102; RCN, p. 16; Sprint, p. 23; PSINet, p. 9; Allegiance, p. 7; e.spire, p. 33; Qwest, p. 64; Ad Hoc, p. 26; xDSL Networks, pp. 6-7; Intermedia, p. 46; ALTS (Attachment – “Economics and Technology of Broadband Deployment,” p. 86).

<sup>113</sup> See AT&T, p. 52.

<sup>114</sup> See, e.g., Bell Atlantic, p. 47 (“Conditioning a loop for one advanced service does not necessarily mean that the loop will support other advanced services.”); BellSouth, p. 48 (“the Commission should not presume that the inability of a competitor to provide DSL service over a loop is the result of discriminatory access on the part of the ILEC.”)



demonstrate that a requested loop can support an advanced service and minimum transmission speed that the industry has already concluded can be supported over a loop of that type would create unnecessary cost and delay. It would also legitimize incumbents' use of spectrum management as a strategic weapon to deter competition.

Presuming technical feasibility, in contrast, places no additional burden on incumbents who are truly acting in a nondiscriminatory fashion. Whenever any party – entrant or incumbent – wishes to provide an advanced service to a particular customer, the incumbent must evaluate the requested loop's capabilities to support the desired service (unless it has already been pre-qualified). Placing the burden of proof on the incumbent simply requires the incumbent to show a requesting carrier when and how the intended use of the loop violates accepted industry standards or violates published nondiscriminatory administrative practices for loop assignment within a cable.

Lacking any technical or economic basis to object to the provision of xDSL capable and equipped loops, the incumbents seek refuge in legal constructs. Thus, incumbents contend that (i) any requirements that they condition basic loops to support advanced services constitute “superior” access in violation of the Iowa Utilities Board decision,<sup>115</sup> and transform

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<sup>115</sup> See, e.g., Bell Atlantic, p. 45 (“The Commission already has found that conditioning local loops to enable competitors to offer advanced digital services constitutes the provision of ‘higher-quality’ access to network elements than provision of non-conditioned loops.”) (citing Local Competition Order ¶ 314 and n.680).

incumbents into construction companies;<sup>116</sup> (ii) any requirements that they unbundle xDSL equipped loops require them to provide a prohibited network element combination. The Commission should reject these arguments.

The Commission has already found that loop conditioning (which involves removing all passive or active electronics such as bridge taps, low pass filters, and range extenders) constitutes a “modification” necessary for incumbents to meet their obligations to provide nondiscriminatory access.<sup>117</sup> Indeed, there is no dispute that without such conditioning, CLECs could not provide advanced services. Hence, as Ameritech (pp. 11-12) concedes, an incumbent “is required to make reasonable modifications to its existing facilities, such as conditioning, to the extent necessary to accommodate interconnection or access to network elements.”<sup>118</sup>

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<sup>116</sup> See, e.g., Bell Atlantic, p. 47 (“Turning every incumbent local exchange carrier into a construction company for its competitors would undermine the incumbent’s ability to operate efficiently”).

<sup>117</sup> See Local Competition Order ¶ 382; NPRM ¶ 152. Many commenters also support the Commission’s decision to require ILEC loop conditioning. See TNS, p. 9; KMC, p. 19; Network Plus, p. 10; RCN, p. 16; CTSI, p. 10; Sprint, p. 23; PSINet, p. 9; Allegiance, p. 7; e.spire, p. 33; Ad Hoc, p. 26; xDSL Networks, pp. 6-7; McLeodUSA, p. 9; Intermedia, p. 55.

<sup>118</sup> See also GTE, p. iv (“GTE voluntarily would make xDSL-conditioned loops available upon request where technically feasible, even in areas where neither its ILECs nor advanced services affiliate provides advanced services, if it fully recovers its costs.”); Ameritech, p. 11 (Ameritech provides ADSL and HDSL conditioned loops).

Indeed, this conclusion, which survived review by the Eighth Circuit,<sup>119</sup> is particularly appropriate in the context of advanced services – conditioning a loop to provide advanced services simply facilitates use of a loop’s existing features, functions, and capabilities. A plain copper loop is inherently capable of supporting both narrowband and broadband services. Only resistance and spectrum management concerns should properly limit the uses to which that loop can be put. Consequently, in those instances where the incumbent has placed equipment such as load coils and bridge taps on a copper loop, it has, for its own benefit, augmented one loop capability (voiceband traffic) at the expense of other existing capabilities (broadband channels). Requiring the incumbent to remove equipment or electronics that inhibit data transmission, then, simply gives effect to the Commission’s previous finding that the ILEC is required to make all features, functions, and capabilities of the loop available to CLECs, rather than limiting the features, functions, and capabilities of the loop to those that the incumbent LEC has chosen to use.<sup>120</sup>

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<sup>119</sup> See Iowa Utils. Bd. v. FCC, 120 F.3d at 813, n.33 (“we endorse the Commission’s statement that ‘the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements. . . . The petitioners themselves appear to acknowledge that the Act requires some modification of their facilities.’”) (citations omitted).

<sup>120</sup> Local Competition Order ¶ 260; see also Opposition to AT&T Corp. to the Petitions of Bell Atlantic Corporation and SBC Communications, Inc. for Reconsideration, Deployment of Wireline Service Offering Advanced Telecommunications Capability, CC Docket Nos. 98-147, et al., p. 2 (filed October 5, 1998). The Commission should also take the opportunity afforded by this proceeding to clarify that loop conditioning costs should be amortized over the life of the loop. Forcing the first CLEC who leases a loop to provide an advanced service to a particular customer to bear all conditioning costs in

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Nor does an xDSL equipped loop constitute a combination of network elements in violation of Iowa Utils. Bd. As AT&T (pp. 46-47) explained in its comments, the Commission repeatedly has concluded that equipment placed on the loop to facilitate transmission is part of the loop and, if the incumbent has placed such equipment on the loop, the entrant can obtain it as part of the loop.<sup>121</sup> DSLAM-type equipment, whether installed in a central office or in a remote terminal, is transmission-enhancing equipment and, when employed, is part of the loop element. The DSLAM functionality (whether provided as a stand alone unit or as plug-in electronics) allows the loop to support greater bandwidth over a longer distance. In this respect, it is no different than load coils that support higher quality voice-grade traffic over longer loops or DLC or other multiplexing equipment that allows greater concentration of loop traffic between a remote terminal and a central office. Indeed, like multiplexers or DLC equipment, DSLAM-type equipment (which performs multiplexing and modulation functions) can be deployed at a remote terminal in the “middle” of the loop.

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the first year would not only raise entry costs, but also allow subsequent carriers – including the incumbent – to serve that customer without incurring loop conditioning costs. A competitively neutral and nondiscriminatory cost recovery scheme would amortize conditioning costs across the life of the loop so that all carriers who benefit from the conditioning contribute to the conditioning costs.

<sup>121</sup> See, e.g., id., ¶ 391 (rejecting defining a concentrator as a subloop element and instead treating it as part of the loop); id., ¶ 383 (discussing loops that contain IDLC equipment).

In sum, the Commission should require incumbents to unbundle basic, xDSL capable, and xDSL equipped loops and to condition loops where necessary to support advanced services. The Commission should also adopt the presumptions proposed by AT&T in its initial comments.<sup>122</sup> Finally, in order to prevent delay in the provisioning of xDSL capable loops, the Commission should clarify that an xDSL capable loop includes spare loops or loops that are currently not being used to provide service.<sup>123</sup> At least in the near term, AT&T understands that incumbents often will provide xDSL service over spare loops. Consistent with the Act's nondiscrimination requirement, the Commission therefore should prohibit incumbents from refusing entrant requests for access to spare copper pairs. This refusal can take the form of an outright refusal or a subtler but equally effective tactic of requiring use of a Bona Fide Request and the subsequent pricing of the loop based upon new construction costs. Neither approach should be tolerated as each effectively precludes entrants from providing service.

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<sup>122</sup> See AT&T, pp. 52-54.

<sup>123</sup> AT&T also agrees with those commenters who have asked the Commission to declare that dark fiber is a network element. Every federal district court to decide this issue has concluded that dark fiber is a network element under the Act and must be unbundled. See, e.g., MCI Telecomms. Corp. v. BellSouth Telecomms. Inc., 7 F. Supp. 2d. 674, 677 (E.D.N.C., 1998); Southwestern Bell Tel. Co. v. AT&T Communications Inc., No. A-97-CA-132-SS, p. 10 (W.D. Tex. Aug 31, 1998). The Commission can reduce further ILEC delay by establishing a nationwide loop rule requiring ILECs to unbundle dark fiber.

**B. The Comments Confirm The Importance Of Preventing Incumbent LEC's From Using DLC Or Other Remote Terminal Configurations To Undermine Loop Unbundling Or Access To Network Elements.**

Many commenters identify logistical and technological that limit the ways that loops passing through remote terminals can be unbundled. At the same time, the comments clearly demonstrate that unbundling of these loops is virtually always possible through one or more of the methods discussed in this section. Just as importantly, the problems identified by the commenters stem from limitations in the incumbents' legacy networks. Most of these problems should be eliminated on a going-forward basis. Consequently, the Commission should implement regulations that not only promote nondiscriminatory access to remote terminal space as well as loops passing through those facilities, but also expand the opportunities for entrants in the future to deploy advanced services equipment in ILECs' new remote terminals and to access unbundled loops at those points.

The importance of such procompetitive measures cannot be overstated. The comments submitted in this proceeding strongly indicate that remote terminal and DLC loop configurations will become increasingly prevalent, especially for rural customers.<sup>124</sup> By moving advanced services equipment such as DSLAMs closer to the customer, a carrier can vastly increase transmission speeds. Hence, an ILEC could soon offer, for example, full video services by placing DSLAMs in remote terminals located 3,000 feet or less from customers' premises. If entrants cannot place similar facilities in the ILEC's remote terminals, then the entrants almost

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<sup>124</sup> See, e.g., BellSouth, p. 26 ("BellSouth and other ILECs continue to place fiber deeper into their networks").

certainly will be precluded from offering competitive advanced services, a preclusion that could easily spill over into their competitiveness for traditional local and other services.

The need for Commission intervention is also clear. The comments confirm that incumbents will abuse remote terminal configurations to inhibit competition by “hiding” local loops absent regulatory protection. For example, ALTS (p. 64) notes that incumbents could “siz[e] [their remote terminals], and their associated power and environmental controls, in such a way as to effectively preclude access by multiple carriers.” But anticompetitive conduct need not be so subtle. GTE (p. 93), for example, continues to insist that DLC configured loops cannot be unbundled for voice or data services even though the Commission found otherwise over two years ago.<sup>125</sup> As discussed *infra*, however, nondiscriminatory access to loops passing through remote terminals is technically feasible and, if the Commission adopts the rules proposed by AT&T and other commenters, ILECs will have greater incentives going forward to build remote terminals, configure their loops, and deploy new DLC technologies in such a manner that today’s problems will be largely eliminated tomorrow. The Commission, then, should seize the opportunity afforded by this proceeding to transform a potentially devastating barrier to competition for advanced services and possibly local competition in general into a short-term problem that will have a relatively small impact on customer choice and rates in the future. At a minimum, the Commission should take aggressive steps to, “ensure that any advanced services

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<sup>125</sup> Local Competition Order ¶ 382.

loop provided through DLC technology in remote terminals or customer premises locations is available to competitors as an unbundled element, including all electronics.”<sup>126</sup>

Incumbent attempts to restrict entrant access to remote terminal configured loops fall into two basic categories. First, they insist that it is not technically feasible to offer xDSL services over IDLC configured loops. Second, some incumbents claim that access to unbundled loops at remote terminals is not feasible. Neither claim is supportable.

**IDLC configured loops.** It is plainly possible to groom IDLC loops so that they can support xDSL services. AT&T (pp. 68-69) identified several feasible methods that were echoed by other commenters, including at least one incumbent.<sup>127</sup> It is also possible that, in the future, new DLC technology may support xDSL services.<sup>128</sup> At this time, then, the Commission

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<sup>126</sup> Qwest, p. 68.

<sup>127</sup> See, e.g., Ameritech, pp. 14-15 (“If no suitable spare copper facilities are available, Ameritech searches to see if there are existing customers served by copper facilities in the same area that can be transferred to the DLC system. If such copper facilities can be reasonably made available and re-arranged to meet the CLEC’s request, Ameritech offers to use those copper facilities. Again, the CLEC is advised of the need to re-arrange facilities and the associated costs, and given the opportunity to accept or cancel the order.”); *id.*, p. 15 (“Where feasible, Ameritech already provisions requests for xDSL-compatible loops, where a compatible loop is not currently available, by assembling spare existing copper components into a compatible loops.”); Sprint, pp. 28-30; KMC, p. 19; MCI WorldCom, p. 71; Network Plus, p. 11; ICG, pp. 32-33; Northpoint, p. 20; Illinois, pp. 15-16; Intermedia, p. 57; ALTS, p. 62; accord xDSL Networks, pp. 6-7; IAC, p. 19; Rhythms, p. 7; Cincinnati Bell, p. 35; Intermedia, p. 47; e.spire, pp. 44-45; Paradyne, p. 9.

<sup>128</sup> See, e.g., xDSL Networks, p. 8 (“One possible solution to the ‘technical feasibility’ or space concerns would be to require those ILECs raising these concerns to replace these DLCs with xDSL-compatible third-generation DLCs and offer their capabilities to competitors.”); AT&T, p. 69, n.125.



should require loop unbundling when a DLC or other remote terminal configuration is involved through one of three methods: (i) unbundling an xDSL capable “home run” copper loop (provided equivalent bandwidth capability is delivered); (ii) unbundling an xDSL equipped loop; or (iii) unbundling a basic loop.<sup>129</sup> The Commission can expand this list of required methods as the relevant technology evolves. Further, the Commission should establish a presumption that all new ILEC loop deployments and reconfigurations following the promulgation of the Commission’s rules in this proceeding can support xDSL capable loop unbundling. If not, then the loop facilities must be reconfigured at the ILEC’s expense so that entrants can lease an unbundled xDSL capable loop that supports the same transmission speeds and service quality achievable by the ILEC. This presumption will create a strong disincentive for ILECs to hide loops in DLC type configurations.

GTE contends that “[w]hile the 1996 Act requires ILECs to unbundle at any ‘technically feasible’ point, it does not require ILECs to use any technically feasible method. As long as the unbundled DLC-loop has all of the features, functions, and capabilities to allow the provision of advanced services, there is no reason to allow the CLEC to dictate the method of unbundling.”<sup>130</sup> GTE’s argument ignores, however, the critical role that loop characteristics play

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<sup>129</sup> See AT&T, pp. 68-69. ILECs should be required to offer unbundled “home run” loop at a reasonable price. AT&T has encountered situations in which ILECs “offer” home run loops but only if AT&T is willing to thousands of dollars in “special construction” charges to build the loop, making the facility effectively unavailable.

<sup>130</sup> GTE, p. 95 (emphasis in original).

with respect to data services. While it may be acceptable for an entrant, when providing voice-grade service, to obtain an 18,000 foot loop instead of the DLC loop GTE uses, the same would not be true in the case of ADSL service. If the copper loop distribution segment of the DLC loop is only 3,000 feet long, then GTE may be able to provide data services at transmission rates sixteen times as fast as those the entrant could achieve on the 18,000 foot loop. Simply put, the method of unbundling can be just as important to achieving the Act's nondiscriminatory access requirement as the point of access. In addition, both the Commission and the Eighth Circuit already have properly held that an incumbent must take whatever steps are necessary to meet its statutory obligation to provide nondiscriminatory access to network elements, even if that requires modifications to existing facilities.<sup>131</sup> Hence, the Commission should either permit the entrant to choose the method of unbundling or, at a minimum, require the incumbent to unbundle using a method that can support the same service quality that the incumbent's own loop can achieve.

In addition, due to space and technical limitations in currently deployed remote terminals, there may arise circumstances where the ILEC (or its separate affiliate) is capable of making available DSLAM-type functionality for a particular customer, but a CLEC is not. For example, space exhaustion in a remote terminal or central office might make it impossible for a CLEC to collocate a DSLAM, but the ILEC (or its affiliate) may already have a DSLAM with

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<sup>131</sup> See Iowa Utils. Bd. v. FCC, 120 F.3d at 813, n.33.

spare or expandable capacity deployed in that location. Similarly, in the near future an ILEC may have DLC equipment that accommodates line cards supporting xDSL services, but no space available in the remote terminal for DSLAM collocation. In such instances, the Commission should require the ILEC to provide the entrant an xDSL equipped loop by modifying an xDSL capable loop.<sup>132</sup> Such modification does not constitute superior service because, among other things, it is the same service that the ILEC is providing to its own customers. In fact, if the CLEC's customer had requested the xDSL service from the ILEC instead, the ILEC would have modified an xDSL capable loop in the same manner.

In all events, the Commission should clarify that "any solution to the problem of offering xDSL services through a DLC that the ILEC uses for itself or for an affiliate must be offered to non-affiliated carriers in complete parity with respect to quality of service, provisioning intervals, and the like."<sup>133</sup> If the incumbent LEC or its affiliate is providing an advanced service over any loop passing through a remote terminal, then non-affiliates should be able to lease that loop or another loop that will support the same quality service. Any other requirement would significantly increase the advantages that ILECs already hold over their competitors.

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<sup>132</sup> As explained above, DSLAM-type equipment, like other multiplexing and transmission enhancing equipment, is loop equipment.

<sup>133</sup> Sprint, pp. 32-33; see also id., p. 32 ("If an ILEC or an advanced services affiliate thereof offers xDSL service through a DLC-delivered loop, the ILEC must enable an unaffiliated requesting carrier to offer the same or similar service to end users served by that DLC at parity."); e.spire, pp. 46-47; Northpoint, p. 28; ALTS, p. 65.

**Access to unbundled loops at remote terminals.** The Commission should also reject the incumbents' argument that access to loop elements at remote terminals is not feasible. While virtually all commenters agree that access to remote terminals is critical to competition in advanced services,<sup>134</sup> incumbents nevertheless insist that the lack of available space in remote terminals and various safety concerns counsel against access to loop elements at those points.<sup>135</sup> They do not even begin to demonstrate, however, that low-intrusion configurations such as a cross-box to cross-box interconnection arrangement present any significant space or safety concerns, nor will they be able to do so in most instances. BellSouth (p. 50) agrees that the cross-box to cross-box arrangement "allow[s] the competitor to access the unbundled network elements that it has obtained without compromising the security or integrity of its (or the ILEC's) network." Other loop access methods at remote terminals are apparently working as well given that some incumbents claim to be frequently providing entrants with such access.<sup>136</sup> Consequently, the Commission should confirm what many commenters have demonstrated – access to unbundled loops at remote terminals is presumptively technically feasible at least when a cross-box to cross-box arrangement is used.<sup>137</sup> The Commission should further clarify that

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<sup>134</sup> See, e.g., PSINet, p. 16; Transwire, p. 38; Northpoint, p. 20; xDSL Networks, p. 8; accord TNS, p. 9; MCI WorldCom, p. 70; Allegiance, p. 9.

<sup>135</sup> See, e.g., Bell Atlantic, p. 51; SBC, p. 45.

<sup>136</sup> See, e.g., Ameritech, p. 17; BellSouth, p. 50.

<sup>137</sup> See, e.g., KMC, p. 22; accord RCN, p. 17; BellSouth, p. 50; xDSL Networks, p. 8; Intermedia, pp. 58-59; TNS, p. 9; MCI WorldCom, p. 70; GSA, p. 17; GTE, p. 98; PSINet, p. 15; Allegiance, p. 9; ITA, pp. iv, 19; e.spire, p. 46-47; Transwire, p. 38; CIX, (footnote continued on following page)

entrants are permitted to access unbundled loops at or near the remote terminal, through transmission media, including but not limited to fiber or copper transmission cables, and to install their own transmission enhancing equipment (such as DSLAM functionality, DLC equipment, or both).<sup>138</sup> And in order to facilitate these methods of access to unbundled loops, the Commission should require incumbents to obtain for entrants any access to rights-of-way or other pathways that the entrants need to perform cross-box to cross-box interconnection and similar arrangements.<sup>139</sup>

In addition, the Commission should find that: (i) “cageless” collocation is permissible at remote terminals; (ii) the incumbent (or its separate affiliate) should be required to remove any equipment from its remote terminals that is not used or useful in order to maximize the available space; and (iii) an incumbent’s separate affiliate use of remote terminal space is limited to 25 percent of the available space or a percentage equal to that afforded other

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p. 27; Northpoint, pp. 20-21; NAS, p. 30; OpTel, pp. 4-6; US Xchange, pp. 10-11; McLeodUSA, p. 10; Supra, p. 11; Rhythms, p. 12; First Regional, p. 12; TRA, p. 44; ALTS, p. 65.

<sup>138</sup> In many instances, interconnection at the remote terminal using copper cables will promote more efficient use of central office and remote terminal collocation space. See AT&T, pp. 69-71.

<sup>139</sup> Accord RCN, p. 17 (“in the event that existing pedestals or remote terminals do not have sufficient space to accommodate all request for unbundled access, the Commission should require ILECs to construct, or allow the CLEC to construct, an adjacent remote terminal.”); CTSI, p. 11; KMC, p. 23; Allegiance, p. 10; e.spire, pp. 24-25.

requesting entrants if more than three entrants have space requests pending.<sup>140</sup> These requirements will promote nondiscriminatory access and the efficient use of remote terminal space.

Finally, when allocating remote terminal space, most commenters addressing this subject, including AT&T, support a first come, first served rule.<sup>141</sup> At the same time, AT&T agrees with Sprint (pp. 33-34) that the Commission should not allow carriers to warehouse space or allow the incumbent's affiliate to be the only carrier that can use that space.<sup>142</sup> In addition, the Commission should adopt Sprint's proposal (p. 32) that an incumbent's "[f]ailure to make reasonable provision in new [remote terminal] construction (i.e., construction begun after a final order is issued in this proceeding) for unbundled xDSL-capable loops could be deemed an unreasonable and anticompetitive practice." This treatment will further reduce the ability of incumbents in the future to hide unbundled loops through remote terminal configurations.

**C. The Comments Confirm The Need For Modification Of The Commission's OSS Rules To Include Loop Characteristics And Loop Pre-Qualification Information, As Well As The Standards Used by Incumbents In Pre-Qualifying And Qualifying Loops For Advanced Services.**

Virtually all commenters agree that the Commission must revise its existing OSS rules to make available to entrants on a nondiscriminatory basis any essential loop characteristic

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<sup>140</sup> See AT&T, pp. 70-71.

<sup>141</sup> See, e.g., SBC, p. 44; GTE, p. 100.

<sup>142</sup> See AT&T, p. 70.

information.<sup>143</sup> Otherwise, incumbents will continue to use the pre-ordering, ordering, and provisioning process to discriminate against competitors, as they have in the basic local service context.<sup>144</sup> These anticompetitive practices can have even more dire consequences in the advanced services context. As AT&T pointed out in its initial comments, without nondiscriminatory access to the loop qualification information, entrants seeking to provide advanced services will be in the untenable position of having to lease a loop, subsequently determine if the loop is on DLC, ascertain if it was engineered with active or passive electronics, establish its length and resistance, test the loops capability to support an advanced service, and then – if it passes all these hurdles – subject it to potential rejection under spectrum management standards.

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<sup>143</sup> See, e.g., RCN, p. 16 (“RCN agrees with the Commission’s tentative conclusion that, as part of the rules governing [OSS], ILECs should be required to provide CLECs on request with sufficient information about the loop to enable them to determine whether the loop is capable of supporting xDSL.”); Sprint, p. 20 (“however an ILEC chooses to offer xDSL service, it must provide the same type of information about the loop to unaffiliated carriers as its own internal personnel or affiliates have access to, and within the same time frames.”); U S WEST, p. 45 (U S WEST has loop qualification information “available as a result of its own use of loops.”); Ameritech, p. 16; CTSI, p. 10; Sprint, p. 20; PSINet, p. 14; Allegiance, pp. 7-8; e.spire, p. 35; ICG, pp. 28-29; Illinois, p. 15; Qwest, p. 60; Paradyne, p. 33; Supra, pp. 8-9; TRA, p. 43; Intermedia, p. 49; ALTS, p. 59; MCI WorldCom, pp. 63-64; KMC, p. 20; IAC, p. 20; Level 3, p. 15; GSA, p. 15; MGC, p. 38.

<sup>144</sup> See, e.g., MGC, p. 37 (“The most pervasive means an ILEC has to frustrate true competition is through the loop provisioning process.”); *id.*, p. 39 (“Roughly 40% of the orders MGC submits to the GTE ordering center are copied incorrectly, which results in orders being rejected.”); *id.*, p. 44 (“GTE routinely sends invoices for local loops to its former customers, rather than sending them to MGC.”) (footnote omitted).

Indeed, even some incumbents now agree that entrants must have access to “‘loop qualification’ information – information regarding loop length, loop coils, bridge taps, decibel loss, line carriers, and the like.”<sup>145</sup> There can be little doubt, then, that the Commission should expand and clarify its OSS and other information disclosure rules to ensure that entrants have nondiscriminatory access to incumbent loop data and that pre-ordering, ordering, provisioning, maintenance, and repair are performed in the same time intervals for entrants as they are performed for incumbents and their affiliates.

Given the paucity of information voluntarily submitted by incumbents on their loop characteristic databases and outside plant engineering records, the Commission must promulgate broad generic rules aimed at achieving parity of access to this critical information. On this point, there can be little debate. Without access to the same information and the ability to use the information in the same time frame as the incumbents, entrants will be at an overwhelming competitive disadvantage.<sup>146</sup>

At an absolute minimum, the Commission should promote nondiscriminatory access by requiring incumbents to disclose the five loop characteristics identified by MCI WorldCom: “(1) whether the loop passes through a remote terminal, (2) whether it includes any

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<sup>145</sup> U S WEST, pp. 44-45; see also BellSouth, p. 49 (“Of course, to the extent BellSouth has compiled such information, it will be made available to competitors upon request.”); U S WEST, p. 45 (the Commission’s rules require ILECs to “make available to competitors the information it compiles in conducting its own operations.”).

<sup>146</sup> See Cincinnati Bell, p. 36 (“it is appropriate and within the spirit of the act to provide the same interval to a competitor that it would provide for itself for a similar loop”).



attached electronics, (3) the condition and location of the loop, (4) loop length, and (5) the electrical parameters of the loop.”<sup>147</sup> This information is needed for an entrant to ascertain whether a loop will support a particular advanced service and what additional electronics such as a DSLAM need to be deployed.<sup>148</sup> The Commission could better promote advanced services, however, by requiring the ILECs to provide data that will allow CLECs to answer the following questions.

- Is there a digital loop carrier present anywhere between the customer’s premises and the collocation point where the CLEC interconnects with the loop? If so, what type of DLC is present? Certain types of DLC currently may not support xDSL service thereby requiring grooming or the leasing of an xDSL equipped loop. Other types of DLC may require additional or new electronics.
- Are there any intervening active or passive electronics on the loop such as range extenders, low pass filters, or load coils? These types of intervening electronics will require loop conditioning because they impede xDSL services by filtering out the high bandwidth signals.
- Are there bridge taps on the loop? If so, what are the locations, length and gauge of each? A bridge tap is any branch or extension of a cable pair beyond the point where it is used and in which no direct current flows when CPE is connected to the pair in use. If the loop has one or more bridge taps extending beyond the customer’s point of termination, those bridge taps must also be identified as well as those exiting between the customer and the central office.
- What are the working and total lengths of the loop? How many feet of each wire gauge make up the length of the working loop? The working

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<sup>147</sup> Accord AT&T, pp. 54-57.

<sup>148</sup> ILEC claims that they do not have this information should be disregarded. This basic information should be contained in their outside plant engineering plans. If an ILEC has not maintained such records, then they should be required to remedy this gross mismanagement of their outside plant by collecting the information without delay.

length is the sum of all cable segments from the central office to the customer's point of termination (e.g., the NID). The total length is the sum of all cable segments, including bridge taps. Thus, the total length will equal or exceed the working loop length. The lengths of the loop segments and the wire gauge of each segment will affect the degree of signal attenuation and therefore the advanced services types and transmission speeds the loop can support. Determining whether or not total length exceeds the working length is especially important because it indicates the presence of bridge taps that may extend, for example, beyond a customer's premise.

- What is the total loop resistance measured in ohms? Loop resistance is one of the most important factors in determining the amount of signal attenuation that will occur for a particular advance service.
- What is the loop's overall quality of the loop? To the extent that the ILEC keeps records that permit evaluation of loop quality, the ILECs should provide that information to CLECs. This data include any overall quality indicator that may be retained with the loop record, even if it is subjective in nature. Likewise any baseline test results recorded for the loop and any history of trouble tickets logged for the loop should be disclosed.
- How many "disturbers" based on the list in T1.413 Issue 2 are present within the same binder group in which the loop is located and what is the nature of each disturber? How many "disturbers" based upon the list in T1.41.3 Issue 2 are present within the same cable and what is the nature of each? A disturber is any service that the T1 standard identifies as having the potential to generate inter-service inference. T1.413 Issue 2 is the national standard (ANSI), issued by the T1 E1.4 subcommittee of ATIS, which governs operating parameters of xDSL services. A binder group typically is a set of 50 twisted copper pairs bound together within a cable as a distinct subgroup. ILECs should inform CLECs about the proximity of disturbers as they are a potential source of interference that, in turn, may degrade maximum throughput and overall service performance.
- What loop design strategy was used for the loop? The ILEC may have employed one of a number of design strategies for the local loop that may influence the minimum transmission performance. These strategies include Resistance Design ("RD"), Long-Route Design ("LRD"), and Unigauge ("UG"), which were largely employed prior to 1980, as well as Revised Resistance Design ("RRD"), Modified Long-Route Design ("MLRD") and Concentrated Range Extender with Gain ("CREG"), which have been used since 1980. RDD most likely will be the predominant design criteria.

Of course, the availability of this information does not guarantee that a unbundled loop will support the intended advanced service. The information only increases the probability of successful deployment. Without answers to these questions, however, CLECs will be forced to undertake an even more uncertain trial and error process that will undoubtedly produce unnecessary expense and delay. In addition, the Commission should further reduce the uncertainty of the pre-ordering process by requiring the ILEC to perform a pre-service loop test and provide the results to the CLEC in order to establish that the loop will perform as expected. In light of ILEC claims that their loop plant records are unreliable,<sup>149</sup> pre-service testing is a necessary prerequisite for advanced service deployment whether by the incumbent or the entrant.

With respect to its resold services, entrants will need additional information. According to U S WEST (p. 45), that information includes “which advanced services it offers, the offices in which these services are available, the equipment located in such offices, whether a customer qualifies for a particular service in light of considerations such as loop length, and any other information it compiles in the process of serving its own DSL customers.”<sup>150</sup> Hence, the Commission should require ILECs to provide this information through OSS.

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<sup>149</sup> See, e.g., GTE, pp. 82-83; Ameritech, pp. 16-17 (Its loop database contains only “partial and dynamic information” and therefore “would mislead CLECs”).

<sup>150</sup> It is clear that incumbents have access to a growing body of loop information. See, e.g., Level 3, p. 15 (“Indeed, since most major ILECs are deploying or planning to deploy their own xDSL services, they will need to collect this information for themselves”). Hence, the Commission should revisit its loop characteristics disclosure rules in a future proceeding to re-evaluate what information incumbents possess and should be required to disclose.

As always, nondiscrimination is the governing standard. Thus, GTE's claim (p. 83) that it "requires a prior physical evaluation of any loop, both for its own advanced services and those of any CLEC purchasing the loop as a UNE" would be acceptable so long as the physical evaluations are conducted on a nondiscriminatory basis as to timeliness, accuracy, and completeness.<sup>151</sup> If GTE, however, has conducted an advanced survey of the loops located in areas where it intends to offer advanced services, it cannot require an additional physical inspection of candidate loops when a CLEC requests an xDSL capable or equipped loop, unless GTE requires an identical additional inspection for itself or its affiliate at the time a customer orders service.<sup>152</sup>

The Commission should also require incumbents to capture and disclose comparative performance measurement results related to pre-ordering, ordering, provisioning, maintenance and repair, and billing support for xDSL capable and equipped loops by loop type,

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<sup>151</sup> See also Ameritech, p. 16 ("Ameritech does not provide direct access to its loop inventory database to its own data subsidiary or to CLECs. All loop requests, including those for ADSL-compatible and HDSL-compatible loops, are handled in the same manner").

<sup>152</sup> U S WEST (p. 46) argues that "incumbents need only provide loop qualification information for individual loops, rather than in aggregate form (by wire center, for example)." If the Commission decides to limit entrant access to aggregate loop information, it should clarify that an incumbent cannot use the absence of an aggregate loop disclosure requirement to justify discriminatory tactics or delay in the pre-ordering, ordering, or provisioning processes. Thus, if an entrant wants to provide a particular advanced service to given customer, the incumbent must identify the loop that can support that service at the highest quality. If there is any question regarding which loop would be most desirable to the entrant, the incumbent must identify the available alternatives with all relevant loop qualification information.

in addition to reporting on such performance for basic loops. While some incumbents contend that the Commission should rely on negotiation and arbitration to establish time intervals,<sup>153</sup> entrants have already found that those procedures can result in significant cost and delays. As MGC (p. 37) explains: “delays, failures, deliberate mischief, and arbitrary system complexity by ILECs, individually and collectively, drive up the costs incurred by CLECs, forcing carriers like MGC to dedicate substantial resources to doing nothing more than policing ILEC performance.” The Commission must also discourage incumbent practices designed to prevent meaningful performance comparisons. For example, Ameritech (p. 17) seeks to limit direct entrant access to its loop databases with the specious argument that such access “would mislead CLECs by leaving the false impression that xDSL-compatible loops are not available at a location, where Ameritech may in fact be able to provide one.” Access to incumbent database information, even imperfect information, can only help entrants (and is, in any event, mandated by the nondiscrimination requirement). As Ameritech is undoubtedly aware, direct entrant access to loop databases will play an important role in helping entrants detect discriminatory loop assignment, pre-ordering, ordering and provisioning of basic, xDSL capable, and xDSL equipped loops.

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<sup>153</sup> See, e.g., GTE, p. 97 (“GTE opposes the adoption of any prescribed standard intervals. . . . Thus, rather than mandating uniform intervals, the Commission should leave such standards to voluntary, private negotiations backed up by state mediation or arbitration, as Congress intended”).

Of course, when an incumbent provides a loop that does not perform as promised (or at the minimum industry standard levels), it must rectify the situation by repairing the loop or finding an alternative loop that will support the same quality of service in the same amount of time the ILEC provides this service to itself or its affiliate. Finally, the Commission should impose substantial penalties on incumbents who do not perform the aforementioned functions in a nondiscriminatory fashion.<sup>154</sup>

**D. Industry Forums And Not Unilateral Incumbent Action Should Establish Loop Spectrum Management Standards.**

Spectrum management is “an area ripe for ILEC discrimination in favor of any affiliate,”<sup>155</sup> and, in fact, incumbents have routinely used “spectrum management” to justify discriminatory treatment of their potential competitors.<sup>156</sup> “Too often, spectral compatibility concerns are raised simply as a means to thwart competition; many proposed signal power standards serve only to advantage or disadvantage particular technologies and competitors.”<sup>157</sup>

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<sup>154</sup> See, e.g., MGC, p. 45 (There should be substantial penalties for failure to provide OSS in a nondiscriminatory fashion.); AT&T, p. 53. As AT&T pointed out in its comments (pp. 56-57, n.102), ILECs cannot be relied on to collect performance data voluntarily. Indeed, Pacific Bell was recently fined \$309,000 – \$3,000 per day for 103 days – by the California Public Utilities Commission for failing to provide survey data about the quality of its residential and ISDN data-transmission services. See News Release, “CPUC Fines Pacific Bell For Holding Back Data on Poor ISDN Service Quality” (Cal. PUC, released September 17, 1998).

<sup>155</sup> Qwest, p. 61.

<sup>156</sup> See, e.g., MCI WorldCom, p. 65; Level 3, p. 14; Paradyne, p. 3.

<sup>157</sup> Paradyne, p. 3.

For example, Pacific Bell is selectively complying with some ADSL standards specification (T1E1.413 Issue 2) but not with others.<sup>158</sup> Obviously, then, spectrum management cannot be left to incumbent discretion.<sup>159</sup> Indeed, even the incumbents themselves do not contend that they should be the sole arbiters of spectrum management issues.<sup>160</sup>

Where possible, the Commission should rely upon industry forum-based standards. As AT&T (pp. 57-64) discussed in its opening comments, existing standards already address many of the necessary interference issues. But the promulgation of interference standards alone cannot prevent incumbents from using those standards to disadvantage their competitors. The most important standards will address the nondiscriminatory application of such criteria, and no industry forums are currently addressing these issues in any comprehensive manner.<sup>161</sup> Consequently, the Commission should convene a forum to establish nondiscrimination rules that complement the emerging industry standards.<sup>162</sup>

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<sup>158</sup> MCI WorldCom, p. 74.

<sup>159</sup> See, e.g., GSA, p. 18; ITA, p. 18; Transwire, pp. 35-36; e.spire, p. 36; CIX, p. 27; ICG, p. 30; Rhythms, p. 7; First Regional, p. 7; IAC, pp. 19-20; U S WEST, p. 47; KMC, p. 20; MCI WorldCom, p. 65; NCTA, pp. 8-9; Allegiance, p. 8; ALTS, p. 6; accord e.spire, p. 36

<sup>160</sup> See, e.g., Ameritech, p. 24; BellSouth, p. 52; accord U S WEST, p. 47 (“U S WEST expects that its development of PSD masks and others’ contributions to the standards-setting process will adequately resolve current spectrum management issues without need for any intervention by the Commission”).

<sup>161</sup> KMC, pp. 20-21; e.spire, p. 36; Northpoint, pp. 18-19; AT&T, p. 60; accord Sprint, p. 23; Intermedia, p. 52.

<sup>162</sup> Intermedia, p. 52; accord MCI WorldCom, p. 66; Sprint, p. 25.

The potential for incumbent abuse pending the promulgation of nondiscriminatory spectrum management standards is significant and, therefore, incumbent proposals that they should be the arbiters of spectrum management issues during this interim period must be rejected.<sup>163</sup> Already, incumbents have adopted policies that make it difficult for entrants to deploy advanced services. For example, “several of the ILECs are imposing loop specifications for the deployment of DSL services that are more restrictive than the industry defined specifications for the technology.”<sup>164</sup> Allowing incumbents to resolve spectrum management issues would allow them to favor themselves or their affiliates at the expense of their competitors. At a minimum, then, “the Commission should adopt a rule that no ILEC is permitted to exclude non-affiliated CLECs from placing DSL customers within loop plant unless that ILEC has also, at a minimum: (1) publicly announced the rules governing the deployment of xDSL technologies in its loop plant; and (2) applied those rules to its own deployment.”<sup>165</sup>

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<sup>163</sup> See, e.g., SBC, p. 34-35 (spectrum management should be controlled by the ILEC pending national standards).

<sup>164</sup> MCI WorldCom, p. 74.

<sup>165</sup> ALTS, pp. 61-62; see also AT&T, pp. 61-62; Sprint, p. 23 (pending development of national spectrum management standards, ILEC should publish guidelines and apply them nondiscriminatorily. “The ILEC guidelines should be competitively neutral and not favor the performance of the service, equipment or technology used by the ILEC (or its affiliate). . . . The guidelines must also be based on technical feasibility criteria and cannot favor the particular technology or service employed by the ILEC (or its affiliate)”).



Disclosure, however, will not be enough. Incumbents also can use this interim period to entrench their own technology as well as their own services that generate spectral interference (such as repeater-based T1). Through such tactics an incumbent would gain a long-term anticompetitive advantage for itself – or its data affiliate – and create an environment where an ILEC’s rearrangement of services or replacement of equipment is the primary determinant of how fast advanced services are deployed. Indeed, that appears to be exactly what SBC plans. SBC argues that “[e]xisting services should have priority if they operate with the applicable PSD mask requirements, and that new services should be allowed only when they will not degrade an existing service to an unacceptable level.”<sup>166</sup> The PSD masks to which SBC refers are at least in part its own internally developed PSD masks, not industry standard PSD masks and SBC admits that most PSD masks “were not designed with spectrum management in mind, and therefore [are] insufficient for that purpose.”<sup>167</sup> In other words, SBC would have the Commission grandfather its existing services based on its internal PSD masks and prohibit conflicting new services even though those PSD masks may not comply with industry standards and may be incompatible with current spectrum management needs.

For these reasons, AT&T and other commenters have concluded that a balance should be struck between existing technologies and new technologies that will support higher

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<sup>166</sup> SBC, p. 35.

<sup>167</sup> Id.

quality services at lower costs.<sup>168</sup> “[G]iven the current speed at which technology is evolving, establishing an absolute, permanent right for older technology could severely limit the ability of competitors to deploy advanced services[.]”<sup>169</sup> Thus, the Commission also should direct the industry forum it convenes to establish a reasonable sunset period for any equipment or services deployed prior to promulgation of new industry standards that are incompatible with those standards or that create barriers to the rapid growth of advanced services.

Finally, the comments leave no room for doubt that mandatory spectrum unbundling on individual loops would create technical, quality, billing, maintenance, and customer service problems. The host of difficulties detailed by various parties including entrants clearly outweigh the benefits of spectrum unbundling.<sup>170</sup> This does not mean that spectrum

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<sup>168</sup> See, e.g., Sprint, pp. 21-22 (“the Commission should establish a reasonable future date certain prior to which these non-standard technologies must be brought into compliance with the new standards. And once the standards are adopted, all new installations should conform with those standards.”); Qwest, p. 61 (“the Commission should include in its rules requirements that the ILEC continue to upgrade its network facilities to support the widespread provision of advanced services.”); accord GTE, p. 85 (“to the extent that ILECs rearrange plant to accommodate their new service offerings, they should accommodate the requests of CLECs as well. To the extent that CLECs desire the plant to be rearranged for their purposes, they should be required to pay for such rearrangements.”).

<sup>169</sup> Qwest, p. 62.

<sup>170</sup> See, e.g., SBC, pp. 38-39 (“Without a clear point of demarcation between each carrier’s responsibility and the ability of each to manage and control its network, it would be difficult, if not impossible, to perform testing, repair and maintenance on a timely basis, and an administrative nightmare to assess responsibility for an out-of-service condition on a customer’s shared line.”); GTE, p. 89 (with respect to spectrum unbundling, “there is bound to be confusion about which party must perform routine maintenance of the physical facility and how the costs of such maintenance are to be divided.”); Ameritech, p. 21 (“New issues that arise from spectrum sharing include service quality and  
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cannot be unbundled, but any unbundling should be at the discretion of the loop owner.<sup>171</sup> As AT&T (p. 63) discussed in its initial comments, the Commission should find that the features, functions, and capabilities that pass with “ownership” of the loop can be leased to other service providers.<sup>172</sup> There is no reason to believe that a loop supporting voice and data traffic simultaneously cannot support multiple carriers<sup>173</sup> and, in fact, incumbents themselves intend to separate their loops’ advanced data service capability from their voice functions.<sup>174</sup> Thus,

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reliability; equipment compatibility; inter-carrier cooperation; operational procedures and practices; administrative systems; and OSS.”); *id.*, p. 22 (“Reserving the higher frequencies on a loop for data spectrum sharing could permanently relegate voice services and CPE to the lower voice frequencies.”); BellSouth, p. 52 (“the cause of the interference would be transparent to the subscriber, who would erroneously attribute the reduction in quality to inferior service by the voice carrier”); AT&T, p. 64 (“If, for example, an internet service provider could obtain the data functionality of a loop owned by another LEC without its authorization, significant billing and customer service difficulties may arise. When service complications arise, the customer is likely to call the LEC despite the fact that (i) the problem may have been caused by the internet service provider or (ii) the LEC might lack the ability to address the problem because the internet service provider controls the implicated facilities.”); U S WEST, p. 47; Bell Atlantic, p. 49; Ameritech, p. 22; Cincinnati Bell, p. 32.

<sup>171</sup> The CLEC controls the loop if it leases that unbundled network element from the ILEC.

<sup>172</sup> Accord Sprint, p. 24 (“When a requesting carrier purchases an xDSL-capable loop as an unbundled network element, then it is purchasing the entire capacity of that loop”).

<sup>173</sup> See, e.g., Ameritech, p. 28; e.spire, p. 37; accord KMC, p. 21; Level 3, p. 16; GSA, p. 16; Allegiance, p. 8; MachOne, pp. 3-4, 9; ICG, pp. 30-31; GST, pp. 34-35; Ad Hoc, p. 27; xDSL Networks, p. 9; ALTS, p. 58.

<sup>174</sup> See, e.g., Bell Atlantic Telephone Companies, Tariff No. 1, Transmittal No. 1076, CC Docket No. 98-168, Order Suspending Tariff and Designating Issues for Investigation, (released September 15, 1998); BellSouth Telecommunications, Inc., BellSouth Tariff FCC No., BellSouth Transmittal No. 476, CC Docket No. 98-161, Order Suspending Tariff and Designating Issues for Investigation, (released September 1, 1998); GTE  
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consistent with the principle that “[t]he Commission should not allow a carrier that purchases a loop to reallocate the responsibility of offering voice service to the CLEC’s customers onto the incumbent simply because it does not wish to provide that service,”<sup>175</sup> it also should not permit an ILEC to prohibit a CLEC from unbundling spectrum to other service providers so long as the services that will be carried over the loop by the other service providers could have been carried over the loop by the CLEC.<sup>176</sup>

#### **IV. THE COMMENTS EXHIBIT WIDESPREAD AGREEMENT THAT THE EXISTING COLLOCATION REQUIREMENTS MUST BE STRENGTHENED TO PROMOTE COMPETITION AND THE EFFICIENT USE OF SPACE.**

The initial comments filed by a host of competitive entrants confirm the extraordinary difficulties that CLECs encounter in obtaining physical collocation in ILEC central

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Telephone Operators, GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, Order Designating Issues for Investigation, (released August 20, 1998); Pacific Bell Telephone Company, Pacific Bell Tariff FCC No. 128, Pacific Transmittal No. 1986, CC Docket No. 98-103, Order Designating Issues for Investigation, (released September 2, 1998).

<sup>175</sup> GTE, p. 89.

<sup>176</sup> There is one instance in which an incumbent should be required to take back voice service from an entrant. If an incumbent provides this service for its affiliate, then it must do so for non-affiliates as well; otherwise, the incumbent could anticompetitively disadvantage its competitors. See, e.g., Sprint, p. 26; GSA, p. 16 (“Incumbent LECs should not be permitted to allow advanced services affiliates to use the ‘other half’ of a loop, while denying that privilege to unaffiliated competitors.”). The Commission should find that the incumbent must take back the voice traffic (if requested) at the lesser of (i) the service’s forward-looking cost or (ii) the rate the incumbent charges its affiliate. This nondiscriminatory pricing standard will reduce the incumbent’s ability to engage in a price squeeze or to give its affiliate an unfair competitive advantage.

offices. The exclusionary practices of the ILECs are manifest throughout the nation, and offer strong evidence of the compelling need for the Commission to promulgate national standards, require collocation of additional types of equipment, expand the types of permissible collocation arrangements, and adopt other collocation requirements to enhance competition for advanced services to consumers.

**A. The Commission Has Clear Legal Authority To Issue Additional Collocation Rules.**

Ameritech complains that the Commission lacks jurisdiction to issue additional collocation rules for advanced services under the Eighth Circuit's decision in Iowa Utils. Bd. v. FCC.<sup>177</sup> But the Commission has unquestioned authority to modify and improve its collocation rules. To begin with, even Ameritech recognizes the Commission's authority to issue such rules if "xDSL technology is an interstate (or jurisdictionally mixed) offering."<sup>178</sup> As AT&T and other parties have explained in the Commission proceedings relating to the various ILEC interstate ADSL offerings, both local and interstate traffic will be carried over the same xDSL loop facility, just as local and interstate calls are carried over traditional voice loops today.<sup>179</sup>

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<sup>177</sup> Ameritech, pp. 32-37.

<sup>178</sup> Id.

<sup>179</sup> See, e.g., GTE Telephone Operators, GTOC Tariff No. 1, GTOC Transmittal No. 1148, Pacific Bell Telephone Company, Pacific Bell Tariff FCC No. 128, Pacific Transmittal No. 1986, BellSouth Telecommunications, Inc., BellSouth Tariff FCC No., BellSouth Transmittal No. 476, CC Docket Nos. 98-79, 98-103, 98-161, Opposition of AT&T Corp. to Direct Cases, pp. 3-6 (filed September 18, 1998); id., MCI WorldCom Comments on Direct Cases, p. 10 (filed September 18, 1998) ("ADSL services have both interstate and intrastate uses"); id., Comments on Direct Cases of Internet Service Providers' (footnote continued on following page)

Ameritech's reliance on the Eighth Circuit's Iowa Utilities Board decision ignores three essential facts. First, as Ameritech admits, the court expressly found that the Commission has authority to issue rules relating to CLEC access to unbundled network elements. CLECs use collocation for precisely that purpose. Second, § 251(c)(6) was enacted specifically to overrule the judicial decision that held the Commission could not issue rules that require incumbents to offer physical collocation.<sup>180</sup> Congress' action clearly authorizes the Commission to issue rules on that subject now. Third, the Eighth Circuit's decision itself upheld the Commission's collocation rules.<sup>181</sup> Indeed, in arguing that the Commission's existing collocation rules should be enforced without change, other ILECs effectively concede the Commission's jurisdiction to issue such rules.<sup>182</sup> In short, there can be no serious claim that the Commission lacks authority to issue additional collocation rules here.

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Consortium, p. 5 (filed September 18, 1998) ("subscribers will use ADSL for the same purpose as the conventional local loop").

<sup>180</sup> See House Report, p. 73 (purpose of § 251(c)(6) was to overrule Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994)).

<sup>181</sup> The LECs asked the Eighth Circuit "to vacate the FCC's entire First Report and Order," Iowa Utilities Board, 120 F.3d at 819. Nevertheless, the court expressly stated that it was "uphold[ing] all of the Commission's unbundling regulations" except for the specific rules it vacated as substantively contrary to the Act. Id. at 818 n. 38. Thus, for example, the court upheld the regulations governing collocation for access to network elements (see, e.g., 47 C.F.R. §§ 51.321, 51.323), without even questioning the Commission's authority to issue those rules.

<sup>182</sup> See, e.g., GTE, p. 76, Bell Atlantic, p. 31.

**B. The Commission Should Establish Additional National Standards.**

In the NPRM, the Commission proposed the adoption of additional national standards that would be used to establish a “floor” on collocation requirements. The Commission made clear that state commissions would remain free to strengthen (but not weaken) the national standards. The comments demonstrate broad support from a wide range of parties, including State commissions, for the view that strengthening the existing collocation standards is not only appropriate, but necessary to promote local competition nationally.<sup>183</sup>

The ILECs generally argue that only the states should have a role in establishing collocation policies.<sup>184</sup> Forcing CLECs to litigate basic rights to access and use of space in every jurisdiction and, ultimately, to contend with individual and varying state standards would not serve the Commission’s goal of efficient national deployment of advanced data services. Indeed, even putting aside the significant additional delay, experience demonstrates that a patchwork of differing state collocation policies could make deployment of consistent telecommunications services across the country all but impossible. Instead, promulgation of national standards that establish fundamental rights of access and space allocation, and which can be improved upon by the individual states, is the only practicable means to enhance the prospects for the national deployment of advanced data services.

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<sup>183</sup> MCI WorldCom, p. 52, US Xchange, p. 7, Minnesota, p. 17; KMC, p. 13, Allegiance, pp. 2-3, RCN, pp. 11-12, CWI, p. 9, Texas, p. 7; Illinois, p. 8, xDSL Networks, Inc., p. 12; Westel, p. 13; Nextlink, p. 12; ICG, p. 16; Intermedia, p. 21; TRA, p. 38; Sprint, p. 10; Level 3, p. 8; and CompTel, p. 8.

<sup>184</sup> See, e.g., Bell Atlantic, p. 31, BellSouth, p. 46, SBC, p. 20, U S WEST, p. 36.

**C. The Commission Should Expand The Types Of Equipment That May Be Collocated.**

Many commenters share AT&T's view that it is imperative that the Commission clarify and expand its rules with respect to the types of equipment that may be collocated.<sup>185</sup> As AT&T explained, the Commission should expressly permit collocators to place Remote Switching Modules ("RSMs") in collocation arrangements, and prohibit any limitations or restrictions on the use of the RSM's capabilities. Although ILECs have offered no legitimate justification why CLECs should not be allowed to collocate and use RSMs in the same manner as ILECs use them today, AT&T and other CLECs have had to litigate their right to do so in numerous individual state arbitrations and federal court appeals.<sup>186</sup> More generally, AT&T and other parties propose that the Commission refrain from specifying that only particular technologies or types of equipment are eligible for collocation. Technological advances and new market demands are producing rapid changes in equipment characteristics and functions that make it impractical and counterproductive for the Commission to attempt specific definitions of permissible and impermissible equipment.<sup>187</sup>

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<sup>185</sup> AT&T, pp. 73-78; MCI WorldCom, p. 53; KMC, p. 14; Allegiance, p. 3; RCN, pp. 12-13; CWI, p. 10; Texas, p. 8; ACTA, p. 17; ICG, p. 17, MGC, pp. 33-35; Transwire, p. 24; Intermedia, pp. 32-34; CIX, p. 24; ALTS, p. 43; Sprint, p. 11; GSA, p. 12; CompTel, p. 38; and TRA, p. 39.

<sup>186</sup> AT&T, pp. 76-77. See also MGC, p. 15, Intermedia, pp. 32-34.

<sup>187</sup> See, e.g., KMC, p. 14, GSA, p. 13; GST, p. 27; accord ALTS, p. 44; Sprint, p. 11.



ILECs also should be required to permit CLECs to collocate packet switches. Packet switching equipment placed at the edge of the network are more efficient than if they are centrally located. As such, the deployment of advanced data services will be encouraged if both ILEC and CLECs can deploy efficient data networks. In addition, unlike circuit switched equipment that has a sizeable footprint, packet technology is typically much smaller, amounting to little more than 3 to 6 square feet.<sup>188</sup> Thus, objectives of section 706 can best be served by allowing collocation of packet switching technology.

A number of ILECs object to the suggestion that the Commission should, or could, expand the list of equipment permissible for collocation – arguing, for example, that required collocation of additional equipment is unlawful because it is not “necessary.”<sup>189</sup> These arguments have already been rejected both by the Commission and the Eighth Circuit. The Commission has already, in light of the 1996 Act’s pro-competitive purpose, declined to interpret the term “necessary” in Section 251(c)(6) to mean “indispensable.”<sup>190</sup> Rather, in order “to promote competition consistent with the purposes of the Act,” the Commission properly interpreted the statutory language to mean “used” or “useful.” This decision was not appealed by

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<sup>188</sup> See, e.g., Alcatel 1100 HSS Series 700 or 1000 ATM switch description on the World-Wide-Web at <http://wwwusa.alcatel.com/dataproduct/hssatmt.htm>.

<sup>189</sup> Cincinnati Bell, p. 20; U S WEST, p. 36; SBC, p. 16; Bell Atlantic, pp. 37-38 (the term “necessary” in 251(c)(6) means that CLECs may not collocate any equipment “that is not used exclusively for interconnection or access to unbundled network elements” (emphasis in original));

<sup>190</sup> Local Competition Order ¶ 579.

the incumbents, and there are no changed circumstances or new facts that suggest a contrary view today.<sup>191</sup> Accordingly, there can be no question that the Commission can expand the list of equipment eligible for collocation, consistent with the terms of the statute as interpreted by the Commission and Court.<sup>192</sup>

**D. The Commission Should Expand The Types Of Collocation, Including The Offering Of Cageless Collocation.**

It is also important that the Commission require incumbents to make available additional types of collocation arrangements, in order to make more collocation space available and increase the efficiency of its use. Specifically, AT&T recommended that “cageless collocation” – the alternative that would make the most efficient use of limited space – be required.<sup>193</sup> AT&T’s position was echoed by many parties.<sup>194</sup>

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<sup>191</sup> Indeed, the incumbents’ efforts to make the same argument in a similar context were flatly rejected by the Eighth Circuit. In Iowa Utilities Board, the incumbents sought to have the Court apply a similarly rigid definition of the term “necessary” in the context of § 251(d)(2)(A) (availability of network elements). On appeal, the Eighth Circuit expressly affirmed the Commission’s decision. Iowa Utils. Bd., 120 F.3d at 811; see also id., FCC Brief on Petition for Review, p. 91 (reviewing Supreme Court jurisprudence on meaning of the word “necessary”); id., Joint Brief of Intervenors in Support of the FCC, pp. 80-81 (same).

<sup>192</sup> Some ILECs also contend that the Commission cannot require them to collocate equipment that performs switching functions, because to do so would be a taking. See, e.g., GTE, pp. 61-64; Ameritech, pp. 39-40; U S WEST, pp. 36-38. In fact, as explained above, even if collocation is deemed a taking the Act’s collocation provisions were enacted to give the Commission express authority to “take” incumbent property through collocation requirements (with “just compensation” provided by the payment of forward-looking cost-based charges authorized by the Act)

<sup>193</sup> AT&T, pp. 79-81, 85-87.

Consistent with the general theme of their comments that there are no problems requiring Commission action, a number of ILECs argue that no changes should be made in the types of available collocation. Some argued that the Commission should not require cageless collocation, because there was no basis to change from the Commission's decision requiring secured areas in the Local Competition Order.<sup>195</sup> However, additional information that was unavailable in 1996 clearly supports such a change.

First, the available evidence indicates that ILECs are claiming that they have no physical collocation space in an increasing number of offices. The possibility that ILEC data affiliates might begin consuming scarce collocation space also gives the Commission a very real need to explore collocation alternatives that will provide for additional physical collocation space. Otherwise, new competitors will simply be frozen out of an opportunity to compete. Second, the real-world experience of U S WEST, as well as the commercial practices of the internet community, demonstrate that cageless collocation is practical and workable.<sup>196</sup> The new

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<sup>194</sup> MCI WorldCom, pp. 57-61, US Xchange, p. 8, IAC, p. 18; KMC, p. 16, Allegiance, p. 4, RCN, p. 13, CWI, p. 12, xDSL Networks, p. 12; Transwire, p. 26; MGC, p. 21; Intermedia, p. 30; ICG, pp. 21-22; GSA, p. 13; Sprint, p. 14; ALTS, p. 53; TRA, p. 40; CompTel, p. 37 and attached White Paper: "Uncaging Competition."

<sup>195</sup> See, e.g., Bell Atlantic, pp. 32-33; GTE, pp. 68-69.

<sup>196</sup> See AT&T, pp. 85-87. While SBC claims that the U S WEST approach is "impossible to manage from a security standpoint," that statement reveals more about SBC's attitudes towards competition than any inherent flaws in U S WEST's practices. See SBC, pp. 22-27. SBC offers nothing more than fanciful speculations about possible security risks, but no evidence that security problems have occurred in other circumstances  
(footnote continued on following page)

evidence, therefore, provides an ample basis for the Commission to revisit its prior collocation rules.<sup>197</sup>

ILECs also argue that cageless collocation poses unacceptable security risks.<sup>198</sup> For example, Ameritech argues that there must either be separate keyed entrances to a confined space or there must be escorts.<sup>199</sup> Limiting cageless collocation to a “shared” confined space with separate entrances does not significantly increase the amount of space otherwise available for collocation – only a limited portion of the central office is typically available for collocation

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(footnote continued from previous page)

involving non-ILEC personnel, or any reason to assume that CLEC technicians would be likely to commit such acts.

<sup>197</sup> BellSouth contends that the Commission cannot presume that an arrangement is technically feasible at one location simply because it is used at another, because that is not always so. BellSouth, p. 46. But it is usually so, and that alone justifies the Commission’s proposed presumption, particularly in light of the incumbents’ asymmetrical control over the relevant facilities and data and their anticompetitive incentives to abuse that control to deny access. As always, the incumbent would be permitted to rebut the rebuttable presumption with specific, convincing evidence that a particular arrangement used at one location is infeasible at another location.

<sup>198</sup> BellSouth, p. 46 (opposing any FCC national regulations on collocation as “micromanagement”); SBC, p. 22; Bell Atlantic, pp. 32-34; and GTE, p. 68. Bell Atlantic states that adoption of cageless collocation would mean that ILECs are the only entities that could not secure their own equipment to protect it from access by others. Bell Atlantic, p. 34. Naturally, in a cageless collocation situation Bell Atlantic could elect to house its equipment in secure cabinets if it wished. Bell Atlantic also overlooks the fact that all CLEC circuits ultimately are served from the ILEC’s Main Distribution Frame, and thus the ILEC always has exclusive access to every circuit that the CLEC has provisioned in an office.

<sup>199</sup> Ameritech, p. 42.

arrangements with separate entrances. Cageless collocation, by contrast, allows any available conditioned space to be used for collocation.<sup>200</sup>

Nor does Ameritech explain why escorts are necessary. U S WEST does not require escorts for cageless collocation, but permits CLEC technicians to enter their facility provided they are suitably registered and have the proper identification and pass cards. Moreover, ILECs permit contract maintenance personnel, vendor technicians, temporary employees, and many other people to enter their central offices every day without requiring that they be escorted everywhere they go. None of the ILECs offer any reasons why CLEC technicians must be regarded as a greater security risk than any of the other non-ILEC personnel who are allowed to work in ILEC central offices.

The comments also make clear that virtual collocation is not an adequate alternative to cageless collocation. Virtual collocation deprives the CLEC of important access to its equipment, may result in inexperienced ILEC technicians attempting to maintain the equipment, and can result in unacceptably long repair intervals where emergency repairs are needed at unmanned locations or after normal working hours.<sup>201</sup> As CompTel points out, virtual collocation “increases the costs of routine maintenance and could adversely affect the service quality provided by the CLEC to its customers.”<sup>202</sup>

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<sup>200</sup> See, e.g., CompTel White Paper, pp. 11-14, 16, 18.

<sup>201</sup> See, e.g., *id.*, p. 16.

<sup>202</sup> *Id.*

Similarly, Covad highlights a number of basic shortcomings with virtual collocation that would not occur in a cageless collocation situation.<sup>203</sup> For example, virtual collocation leaves the CLEC with little or no control over their equipment cost and service quality. It imposes costs on the CLEC to train one or more ILEC technicians at considerable expense to perform maintenance, but gives the CLEC no control (e.g., the ability to assign or dismiss) a technician whose performance is unacceptable, or to keep one whose performance is exceptional. Moreover, if there is competing demand for the technician's time, ILEC services will likely be favored.<sup>204</sup> Virtual collocation also entails considerable coordination with the ILEC, which will inevitably lead to communication and logistical problems in connection with the virtually collocated equipment that the ILEC does not experience for its own services and equipment.<sup>205</sup> Covad also notes that virtual collocation may result in the ILEC learning trade secrets about its competitor's business.

To the extent the Commission believes there is any merit in the objections raised by the ILECs about cageless collocation – and there is none – an alternative approach would be to treat cageless collocation as a “fall back” requirement for central office collocation. Under this approach, the Commission would require that ILECs offer cageless collocation in central offices in which they can no longer satisfy collocater requests for physical collocation using

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<sup>203</sup> See Covad, pp. 35-36; id., Affidavit of Regan (“Regan Aff.”).

<sup>204</sup> Regan Aff., p. 32.

<sup>205</sup> Id., p. 33.

shared or individual caged collocation arrangements. In this way, the number of central offices in which cageless collocation is required will be reduced, and if an ILEC truly wishes to avoid offering cageless collocation it will have a strong incentive to find the necessary space for “caged” physical collocation.<sup>206</sup>

Although vastly inferior to cageless collocation, even shared collocation cages would be an improvement over the status quo, since a shared cage utilizes space much more efficiently than the standard individual 10 by 10 cages that the ILECs now require. Accordingly, at a minimum the Commission should require that ILECs offer shared collocation cages.

The Commission should not, however, simply order smaller minimum sizes for cages. As AT&T explained in its initial comments, smaller cages are an even less efficient use of central office space than the current arrangements.<sup>207</sup> For collocators with modest space needs, cageless or shared cage collocation is a far preferable alternative.<sup>208</sup>

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<sup>206</sup> In order to create an incentive for ILECs to properly plan for collocation needs, and provide the physical collocation space that their competitors need, ILECs should not be allowed to recover the costs of any additional security measures they deem necessary for “cageless” collocation. Such a result is appropriate given that U S WEST only requires appropriate pass cards and badging of CLEC technicians, and hence has established a appropriate “benchmark” standard. Moreover, the internet community does not utilize special security arrangements, which further demonstrates the practicality of this approach.

<sup>207</sup> AT&T, pp. 80, 83-84.

<sup>208</sup> Requiring ILECs to eliminate the use of “Point of Termination” bays (“POT bays”) will also significantly increase the efficiency of collocation space utilization and significantly decrease costs. AT&T, p. 82.

Finally, the Commission should also make clear that ILECs must provide appropriate “collocation” opportunities in remote terminals, controlled environmental vaults, and other points at which copper loop facilities terminate.<sup>209</sup> The ILECs predictably object to offering any collocation rights in remote locations,<sup>210</sup> but other commenters have demonstrated the clear need for such forms of collocation.<sup>211</sup> Although traditional “caged” collocation arrangements are unlikely to be feasible in many remote facilities, other options, such as cageless arrangements, are both practicable and necessary, in order to bring advanced services competition to customers whose copper loops terminate at such locations.

**E. The Commission Should Establish New Policies To Deal With Collocation Space Allocation and Exhaustion.**

As AT&T explained in its initial comments (pp. 88-89), the processes followed in the allocation of collocation space, and the treatment of collocators as space becomes exhausted, require reform. This need is especially acute where an ILEC data affiliate may be using scarce collocation space.

As multiple commenters note, one straightforward and effective solution to collocation space problems is to require incumbents to remove obsolete and out-of-service equipment and non-network related functions that are using up scarce space in ILEC central

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<sup>209</sup> AT&T, pp. 70-71; see also supra, p. 51.

<sup>210</sup> See, e.g., BellSouth, p. 50; Bell Atlantic, p. 51; SBC, p. 45.

<sup>211</sup> See, e.g., PSINet, p. 16; Transwire, p. 38; Northpoint, p. 20; xDSL Networks, p. 8; accord TNS, p. 9; MCI WorldCom, p. 70; Allegiance, p. 9.



office buildings.<sup>212</sup> ILECs complain that the concept of “obsolete” equipment is difficult to define and apply.<sup>213</sup> It is undoubtedly true that some equipment may be difficult to cubbyhole. It will be quite clear, however, that other equipment is obsolete or is simply being warehoused. Plainly, the Commission should not reject a rule that will significantly advance the Act’s mandate of nondiscriminatory collocation simply because it may prove difficult to enforce in some cases.<sup>214</sup> The Commission should, in all events, make clear that ILECs cannot deny collocation requests on U S WEST’s proposed ground that central office space is being used to “warehouse” inactive equipment.<sup>215</sup>

A number of parties strongly support the Commission’s suggestion that a requesting carrier should be permitted to tour the central office when the ILEC claims to have no space available.<sup>216</sup> ILECs counter that a series of continuing inspections by individual CLECs would be unduly burdensome. But, as GTE and SBC concede, such inspections could be conducted by a third party who could determine the necessary frequency of inspections based on

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<sup>212</sup> Allegiance, p. 5; Nextlink, p. 14; and ICG, p. 22. AT&T, p. 88.

<sup>213</sup> See Ameritech, p. 44, Bell Atlantic, pp. 42-43, U S WEST, p. 41.

<sup>214</sup> Proof problems could also be addressed, for example, by focusing on the removal of equipment that is not “used and useful,” rather than equipment that is “obsolete.”

<sup>215</sup> U S WEST, p. 41.

<sup>216</sup> See, e.g., ACTA, p. 17; Allegiance, p. 6; AT&T, p. 98; CTSI, p. 9; e.spire, pp. 28-29; First Regional, p. 31; ICG, p. 26; Illinois, p. 12; Sprint, p. 18; Rhythms, pp. 30-31; Northpoint, p. 15; Network Plus, p. 10; NAS, p. 25; MCI WorldCom, pp. 61-62; KMC, p. 18; Intermedia, p. 43; accord Qwest, p. 57.

the nature of requests and the pace of change at the office in question.<sup>217</sup> AT&T would not object to the use of third party inspections, provided that the selection of the third party is made jointly by the ILEC and the CLEC, or by the state commission, and provided that the ILEC agrees to abide by the recommendations of the inspector in the event that the inspector finds space available for collocation.<sup>218</sup>

ILECs also object to providing collocators with updated information on the availability of collocation space in particular central offices.<sup>219</sup> These objections are makeweights. ILECs must obviously monitor their central office space availability on a regular basis in order to gauge expansion requirements and capital investment plans. Requests that information on space availability be made available on a regular basis would not, therefore, be burdensome in the least. More fundamentally, CLECs need to know where collocation spaces are available in order to plan their own networks and capital spending, so this information is essential to proper management and planning of the CLEC's own network.

Finally, as AT&T explained in its opening comments, the ILECs have obvious, anticompetitive incentives to favor their separate subsidiaries in the allocation of collocation

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<sup>217</sup> SBC, p. 29, GTE, pp. 71-72. Ameritech states that state PUC inspections in response to claims of space exhaustion would be agreeable to it. Ameritech, p. 46 .

<sup>218</sup> Bell Atlantic objects to being a "tour operator." Bell Atlantic, p. 42. However, Bell Atlantic will have to give "tours" only where it has refused access to a bottleneck facility to a competitor.

<sup>219</sup> See, e.g., Ameritech, p. 47, BellSouth, p. 47.

space. This fact creates a risk that the ILECs' separate subsidiaries could squeeze out other potential competitors through reservation of collocation space. Accordingly, AT&T proposed that ILEC subsidiaries should not be allowed to occupy or reserve more than 25 percent of current or potential collocation space in any given ILEC location, including Remote terminals.<sup>220</sup> Many other parties expressed similar concerns.<sup>221</sup> The ILECs comments, which request absolute freedom for the ILECs and their affiliates to use up as much collocation space as they want, confirm the importance of Commission regulations that limit the reservation of space by ILEC subsidiaries.<sup>222</sup>

**F. Collocators Should Be Permitted To Use Copper Cable.**

The Commission should permit collocators to use copper cable to interconnect with the ILEC's network, without need for special authorizations.<sup>223</sup> The availability of copper cable, in addition to fiber, will provide important flexibility for advanced services. For example, it will allow parties to offer xDSL services using their own remotely located DSLAM equipment,

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<sup>220</sup> AT&T, pp. 90-91.

<sup>221</sup> MCI WorldCom, p. 54, ACTA, p. 16; Westel, pp. 14, 17-18 (advocating 33 percent limit on affiliate use of collocation space); Nextlink, p. 14; ICG, p. 26; CIX, p. 25 (affiliate should have no right to collocate unless three CLECs already have operational collocation arrangements); CompTel, p. 45 (advocating 33 percent limit on affiliate use of collocation space); and Sprint, p. 12.

<sup>222</sup> Ameritech, p. 48, GTE, p. 65.

<sup>223</sup> AT&T, pp. 91-93. The right to extend copper cables in collocation situations should be extended to all collocators, and therefore AT&T should not be disadvantaged in cases where it is interconnecting from a "condominium" arrangement in the same building as the central office.

in instances where collocation space is no longer available at the central office.<sup>224</sup> The “collocation by nearby location” concept suggested by NEXTLINK also appears to contemplate the use of copper cables from the nearby location into the central office.<sup>225</sup> Accordingly, the Commission should make clear that ILECs have an obligation to permit the use of copper cable, in addition to fiber, for purposes of collocation.

**V. THE COMMISSION SHOULD REJECT THE ILECS’ EFFORTS TO REMOVE EQUIPMENT AND FACILITIES USED FOR ADVANCED SERVICES FROM SECTION 251(C)(3) UNBUNDLING OBLIGATIONS.**

Numerous commenters support the Commission’s conclusions that “all equipment and facilities used in the provision of advanced services are ‘network elements’ as defined by section 153(29),” and “that the facilities and equipment used to provide advanced services are network elements subject to the obligations in section 251(c).” NPRM ¶ 57.<sup>226</sup> In particular, those comments confirm that packet switching, like circuit switching, is a functionality fully subject to the unbundling obligation.<sup>227</sup>

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<sup>224</sup> See Transwire, p. 25.

<sup>225</sup> Nextlink, pp. 16-18. Nextlink proposes placing collocation equipment in a nearby building and interconnecting from there to the ILEC central office, avoiding the need to place electronic equipment in the central office itself. AT&T presumes that this contemplates the use of copper cables from the “nearby” location into the central office, since the use of fiber optic cable would require the placement of electronics.

<sup>226</sup> See AT&T, pp. 93-96; MCI WorldCom, pp. 75-76, 85; SBA, p. 29; Qwest, pp. 8, 59, 69; KMC, p. 24; RCN, p. 20; Sprint, p. 63; ISP, p. 9; Intermedia, pp. 62-63.

<sup>227</sup> AT&T, p. 95; MCI WorldCom, p. 75; e.spire, p. 47; Qwest, p. 65; Intermedia, p. 59.

Not surprisingly, the incumbent LECs nevertheless ask the Commission to exempt the equipment and facilities that they use to provide advanced services from the Act's unbundling requirements. Having failed to convince the Commission that advanced services are not telecommunications services within the meaning of Section 251(c)(3), NPRM ¶¶ 40-44, and having failed to prevail on their claim that the Commission has the authority to forbear from enforcing the requirements of Section 251(c) under Section 706, NPRM ¶¶ 77-79, the incumbent LECs now try a different tack. In particular, the ILECs now argue that because "advanced electronics such as DSLAMs, ATM switches and other packet-switching equipment are . . . readily available to all carriers on the open market,"<sup>228</sup> the failure of an incumbent LEC to provide unbundled access to that equipment would purportedly not "impair" a new entrant's ability to provide advanced services.<sup>229</sup> Accordingly, the ILECs argue, the Commission should conclude that under Section 251(d)(2)'s standards that equipment should not be "subject to section 251(c)'s unbundling obligation."<sup>230</sup> This argument is baseless.

In its Local Competition Order, the Commission construed the term "impair" in Section 251(d)(2)(B) to mean "to make or cause to become worse; to diminish in value," and concluded that that standard is met, and a particular facility or equipment must be unbundled, whenever a new entrant's "cost of providing the service rises" "absent access to the requested

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<sup>228</sup> U S WEST, p. 4.

<sup>229</sup> Bell Atlantic, p. 19.

<sup>230</sup> Bell Atlantic, p. 2; U S WEST, pp. i, 3-7; BellSouth, p. 25.

element.” Local Competition Order ¶ 285. The Commission further concluded that it “must consider this standard by evaluating whether a carrier could offer a service using other unbundled elements within an incumbent LEC’s network.” Id. The Commission thus squarely held that the “impairment” standard is satisfied whenever “the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC’s network.” Id. (emphasis added).

The incumbent LECs do not even attempt to satisfy this standard, much less provide any record evidence that a new entrant could provide advanced services absent access to the ILECs’ packet switches by using other equipment in the ILECs’ networks. Instead, the ILECs simply claim that new entrants could purchase their own ATM switches from third party vendors “on the open market.” See supra. But that claim is simply irrelevant under the Commission’s rules – and with good reason. It is always the case that any network element could theoretically be duplicated elsewhere. As the Commission correctly concluded, however, the failure of an incumbent LEC to provide access to its network elements would nevertheless create a barrier to entry, because new entrants would not initially have the volume of customers that the ILEC has and that is generally necessary to make purchase of redundant facilities economical and because the inherent practical limitations on collocation mean that owning a piece of equipment does not assure an entrant the ability to utilize that equipment in conjunction with the incumbent’s network. See Local Competition Order ¶ 411 (finding that an ILEC’s failure to

provide access to its circuit switches would create a significant “barrier to entry”). An ILEC’s failure to provide unbundled access to its ATM switches would thus “impair” CLECs’ ability to compete as much as would the ILEC’s failure to unbundle its circuit switches.

**VI. THE COMMENTS CONFIRM THAT THE COMMISSION’S PROPOSALS FOR “TARGETED” INTERLATA RELIEF ARE MISGUIDED AND SHOULD NOT BE PURSUED.**

AT&T’s opening comments demonstrated that the Commission’s proposals for exercising its authority under Section 3(25)(B) to modify LATA boundaries as a means of granting BOCs “targeted” interlata relief were ill-advised and should not be adopted. The comments overwhelmingly confirm the soundness of those views – in two quite different respects.

First, the overwhelming majority of non-BOC commenters agree that using Section (3)(25)(B) to grant “piecemeal waivers” of Section 271’s interLATA restriction would be both unlawful and bad policy. They agree that such a policy would unlawfully subvert Section 271<sup>231</sup> and violate the explicit command of Section 10(d), which prohibits the Commission from forbearing from applying any provision of Section 271 until (as has not yet occurred) Section 271 has been “fully implemented.”<sup>232</sup> These comments further point out that Congress specifically provided in Section 271(g)(2) that BOCs could immediately provide, as

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<sup>231</sup> See, e.g., CIX, p. 31; CompTel, p. 51; KMC, p. 25; TNS, p. 10; US Xchange, p. 13.

<sup>232</sup> See, e.g., ALTS, pp. 68-70; CWI, pp. 17-18; Cablevision, pp. 4-6; CIX, p. 32; CompTel, pp. 49-50; e.spire, p. 50; Florida Digital Networking, p. 5; Hyperion, p. 7; Intermedia, p. 66; MCI WorldCom, p. 3; PSINet, p. 16; Transwire, p. 44.

incidental interLATA services, “two-way interactive video services or Internet services over dedicated facilities to or for elementary or secondary schools.”<sup>233</sup> Because the Act provides that this grant was “intended to be narrowly construed,”<sup>234</sup> it would contravene Congress’ express intent for the Commission to attempt to broaden that provision through the back door of LATA boundary modifications.<sup>235</sup>

These commenters further agree that granting such relief would diminish the BOCs’ incentives to comply with the market-opening requirements of Section 271.<sup>236</sup> Indeed, as CompTel points out, a permissive approach to requests for such modifications would also create perverse incentives for the BOCs to withhold providing advanced services as a means of “demonstrating” a need for interLATA relief.<sup>237</sup> The Commission has already begun to see such conduct. In particular, as several commenters note, Bell Atlantic advanced a trumped-up claim of a “bandwidth emergency” in West Virginia on the asserted ground that certain high-speed interLATA data links were unavailable, notwithstanding the fact that Bell Atlantic had never even asked AT&T for the circuits it claimed to the Commission that it could not obtain, that

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<sup>233</sup> See 47 U.S.C. § 271(g)(2).

<sup>234</sup> See 47 U.S.C. § 271(h).

<sup>235</sup> See, e.g., CIX, pp. 32-33; CompTel, p. 49; Florida Digital Network, p. 6; Intermedia, p. 67; Texas, p. 18; Transwire, pp. 44-45.

<sup>236</sup> See, e.g., CWI, p. 17; Cablevision, p. 7; CIX, p. 33; CTSI, pp. 12-13; Intermedia, p. 70; RCN, p. 22.

<sup>237</sup> See CompTel, pp. 50-51.



AT&T could easily have provided those circuits to Bell Atlantic had AT&T been asked, and that Bell Atlantic had actually obtained those circuits from another carrier.<sup>238</sup>

Commenters also agree that, given the advent of digital technologies, Internet telephony, and other rapidly growing overlaps between the worlds of data and voice, any attempt to limit interLATA relief to “data” services would be impossible effectively to police and would create an “administrative nightmare.”<sup>239</sup> Indeed, contributing to that nightmare, Ameritech itself confirms that, if the Commission’s proposals are adopted, “the Commission will be confronted with hundreds of such requests.”<sup>240</sup> And numerous commenters confirm that there is no valid policy basis for setting down that path, for any need for interLATA transport can and will be met efficiently by the existing interexchange market.<sup>241</sup>

Further, these commenters agree that the Commission’s tentative proposals would go well beyond any existing precedents under Section 3(25)(B). As Florida Digital Network explains, neither of the two contexts in which boundary modification authority has been

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<sup>238</sup> See, e.g., MCI WorldCom, p. 92; Sprint, p. 38; Transwire, p. 47 n.111; see also Opposition of AT&T, Request By Bell Atlantic - West Virginia For Interim Relief Under Section 706, Or, In The Alternative, A LATA Boundary Modification, NSD-L-98-99, DA 98-1506 (filed Aug. 10, 1998).

<sup>239</sup> See CompTel, p. 51; see also, e.g., CWI, p. 18; Intermedia, p. 70; MCI WorldCom, p. 90; Nextlink, pp. 28-29 n. 49.

<sup>240</sup> Ameritech, p. 70.

<sup>241</sup> See, e.g., Allegiance Telecom, p. 27; CWI, p. 18; CompTel, p. 51; Florida Digital Networking, pp. 6-7; Hyperion, pp. 9-10; Intermedia, p. 70; KMC Telecom, pp. 27-28; Sprint, p. 37.

generally exercised in the past – to permit individual BOCs to provide flat-rated non-optional expanded local calling service to single “communities of interest” that straddled LATA boundaries, or to change the “associations” of independent telephone companies with particular LATAs so as to enable independent telephone companies to route traffic through a BOC switch in a different LATA than the LATA with which it had previously been associated – “is remotely analogous to allowing LATA boundary modifications to enable a BOC to reach network access points in another LATA. Granting that type of relief would go far beyond the fine-tuning of particular geographic boundaries the District Court granted to recognize local communities of interest. Instead, it would allow the BOC to provide a particular type of interLATA service” – and one which it will in any event be impossible administratively or technologically to confine.<sup>242</sup>

Second, perhaps most revealingly, the BOCs themselves make clear that this proposal is a non-starter and that they have no genuine interest in providing interLATA service in the targeted manner the Commission had in mind. U S WEST (p. 53) complains that the Commission’s proposals “would do little to speed the deployment of advanced services to underserved communities,” and Ameritech (pp. 3, 70) derides the Commission’s proposals as “useless” and “an empty gesture.” Instead, the BOCs seek to use the Commission’s suggestions for circumscribed interLATA relief as a springboard for their own extravagant proposals that

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<sup>242</sup> Florida Digital Network, p. 6; see also Hyperion, p. 9; Transwire, p. 46.

expressly or implicitly attempt to revive the very “forbearance” theories the Commission has already rejected.<sup>243</sup>

For example, Ameritech proposes that the “interLATA prohibition [be] modified” so as to enable it “to provide interLATA transport within a state for data service provided to customers with multiple locations in that state,” as well as to cross LATA boundaries for purposes of providing other data services, as long as it demonstrates that it is complying with federal and state rules regarding the provision of unbundled loops and collocation and has established a separate affiliate in keeping with whatever separation requirements the Commission may adopt.<sup>244</sup> This proposal for a “271-lite” procedure – grants of interLATA relief for data services based on requirements that ignore the competitive checklist, the facilities-based competitor requirement of Section 271(c)(1), and the other statutory requirements imposed by Section 271 – has nothing whatsoever to do with LATA boundary modifications, and is instead a request that the Commission amend Section 271. Such authority is plainly foreclosed by Section 271 itself and by Section 10(d). With exceptions not applicable here, Section 271(a) prohibits the BOCs from providing any interLATA service until all the requirements of Section 271 are satisfied, and Congress specifically provided that the Commission “may not, by rule or

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<sup>243</sup> Compare USTA, p. 12 (seeking forbearance from Section 271) with Memorandum Opinion and Order, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No.98-147, ¶¶ 69-78 (holding that the Commission lacks such authority).

<sup>244</sup> See Ameritech, pp. 69, 71; see also Williams, pp. 12-14; Northpoint, pp. 39-40.

otherwise, limit or extend the terms used in the competitive checklist”<sup>245</sup> or forbear from applying Section 271’s requirements until Section 271 is “fully implemented.”<sup>246</sup>

For the same reasons, Bell Atlantic’s proposals for broad relief to permit BOCs to provide transmission services for internet backbones without regard to geographic boundaries and to provide other interLATA services are likewise foreclosed by the Act.<sup>247</sup> Indeed, Bell Atlantic unwittingly proves that very point. It presents a string cite of MFJ cases that, Bell Atlantic asserts, support the proposition that “[m]odifications of LATA boundaries were granted under the MFJ for specified purposes, particularly to make possible the speedier deployment of new telecommunications services or increased competition.”<sup>248</sup> But contrary to Bell Atlantic’s misstatement, none of the decisions cited by Bell Atlantic involved boundary modifications at all; instead, they granted waivers of the interLATA restriction of the MFJ. And that is precisely the authority that Section 10(d) denies to the Commission.<sup>249</sup>

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<sup>245</sup> See 47 U.S.C. § 271(d)(4).

<sup>246</sup> See 47 U.S.C. § 160(d).

<sup>247</sup> See Bell Atlantic, pp. 5-8.

<sup>248</sup> See *id.*, p. 5 n.2.

<sup>249</sup> Bell Atlantic also engages in an extended discussion in which it claims that a BOC that provides interLATA information service using interLATA transmission services that it obtains from others and resells (as opposed to interLATA services it provisions itself) is not providing interLATA services under Section 271. Bell Atlantic, pp. 9-18. This claim is frivolous. The Commission rejected such claims by Bell Atlantic and other BOCs almost two years ago, and Bell Atlantic neither sought judicial review nor filed a timely petition for reconsideration. See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd. 21905, 21932-21933, 21959-21961 (1996). Indeed, as the Commission noted (*id.* at (footnote continued on following page)

**VII. THE COMMENTS CONFIRM THE COMMISSION'S TENTATIVE CONCLUSION THAT SECTION 251(C)(4) SUBJECTS ADVANCED SERVICES PROVIDED BY INCUMBENT LECs TO THE RESALE OBLIGATION.**

A wide array of commenters supports the Commission's tentative conclusion that advanced telecommunications services are "telecommunications service[s] that the [incumbent LEC] provides at retail to subscribers who are not telecommunications carriers,"<sup>250</sup> and are thus subject to the resale obligation.<sup>251</sup> As e.spire states, "the plain language of that section makes no other conclusion possible."<sup>252</sup>

The incumbent LECs advance two arguments in an effort to avoid this inevitable conclusion. First, they claim that advanced services are somehow "like" exchange access services, and, because the Commission held that exchange access services are not subject to Section 251(c)(4)'s resale obligation, it should similarly declare advanced services exempt.<sup>253</sup>

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21962 n.266), the United States Court of Appeals for the D.C. Circuit has expressly rejected Bell Atlantic's proposed distinction between resale and ownership in a parallel context. See United States v. Western Elec. Co., 907 F.2d 160, 163 (D.C. Cir. 1990) ("We do not agree . . . that a distinction should be drawn between leasing lines, on the one hand, and acquiring or constructing them, on the other. A taxi company, for instance, offers taxi service for hire whether or not it owns or leases its cabs. The critical distinction under the decree is not whether the BOC owns the interexchange capacity, but whether it 'provide[s]' interexchange service to its customers.")

<sup>250</sup> 47 U.S.C. § 251(c)(4).

<sup>251</sup> See, e.g., ALTS, pp. 67-68; CWI, p. 16; CIX, p. 30; CTSI, p. 12; ICG, p. 34; Intermedia, p. 60; IAC, p. 22; KMC, p. 25; MCI WorldCom, p. 87; Texas, p. 17; RCN, p. 22; Sprint, pp. 36-37; Supra, p. 12; TRA, pp. 44-47; Transwire, pp. 40-41; US Xchange, p. 12.

<sup>252</sup> See e.spire, pp. 47-48.

<sup>253</sup> See, e.g., USTA, p. 8; Bell Atlantic, pp. 52-53; U S WEST, p. 5.

As McLeod USA Telecommunications Services explains (p. 7), however, this is an utter non-sequitur: “In the Local Competition Order, the Commission concluded that certain services were not subject to section 251(c)(4) because the vast majority of purchasers were telecommunications carriers, not because they were exchange access services. If a service is in fact generally offered at retail to subscribers who are not telecommunications carriers, then it must be offered for resale at a wholesale discount, regardless of whether it is an ‘access’ service or not.”<sup>254</sup>

And the incumbent LECs have made it abundantly clear that these advanced services are being offered predominantly to end-users and to ISPs, not to telecommunications carriers. Indeed, the essential premise of their rejected forbearance petitions was that these services were subject to the statutory resale obligation (otherwise no forbearance would have been necessary), and those petitions stated that these services would be marketed to end users.<sup>255</sup>

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<sup>254</sup> U S WEST claims that state commissions, and not this Commission, have the “ultimate responsibility to determine whether DSL service should be offered to competitors at a discount.” U S WEST, p. 15. That claim is baseless. Even the Eighth Circuit, which took a narrow view of the scope of the Commission’s authority under the Act, upheld the Commission’s authority to adopt rules that “define[] the overall scope of the incumbent LECs’ resale obligations.” Iowa Utils. Bd. v. FCC, 120 F.3d 753, 819 (8th Cir. 1997).

<sup>255</sup> See, e.g., Petition of U S WEST Communications, Inc., For Relief From Barriers To Deployment Of Advanced Telecommunications Services, CC Docket No. 98-26 (Feb. 25, 1998), p. 3 (U S WEST seeks to provide “advanced data telecommunications and information services to ‘all Americans,’ including residential and small-business customers, and those in harder-to-reach smaller and rural communities”); Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket 98-11 (Jan. 26, 1998), p. 15 (Bell Atlantic “wants to expand the market for high-speed local access products like xDSL in the residential market”).

Similarly, the LECs' web sites make clear that they are offering these services "at retail to subscribers who are not telecommunications carriers."<sup>256</sup>

Second, some of the incumbent LECs claim that when ISPs purchase advanced services and use those services as part of an internet service they provide to their customers, the advanced services are not being provided to the ISP at "retail," but at "wholesale" and thus are not subject to Section 251(c)(4). That claim is erroneous. The fact that the customer of a product or service is a business that uses the product or service to construct its own product or service does not make its purchase a "wholesale" transaction. To the contrary, when a steel company sells steel to an automobile manufacturer, or an ink company sells ink to a newspaper, those are retail transactions.<sup>257</sup> There is no basis for any different classification when LECs sell advanced services to ISPs.

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<sup>256</sup> See, e.g., <http://www.bell-atl.com.adsl> ("Tired of waiting for downloads? Want to get more from your PC? Tap into the Web's true potential and use it the way you want to. Your existing phone line becomes a dedicated high-speed connection that ends the hassle of dial up and busy signals. Experience video, audio, and enhanced graphics - all at speeds up to 240 times faster than your old 28.8 modem"); <http://www.pacbell.com/products/business/fastrak/adsl/index.html> ("*FasTrak* DSL - the fastest way to communicate from your home, home office or small business"); <http://www.ameritech.com/products/data/index.html> ("By the end of the century, 70% of the homes in the Great Lakes region will have access to the service"); <http://www.bellsouth.net/external/adsl> ("BellSouth.net FastAccess<sup>SM</sup> Service uses Asymmetric Digital Subscriber Line (ADSL) technology which provides high speed Internet access for your home or office using your existing copper telephone line - up to 50 times faster than traditional 28.8 modem speeds").

<sup>257</sup> Courts have long recognized that a sale of a good or service by one firm to another firm may be a retail transaction even though the firm purchasing the good or service may use it to create another good or service that it sells to its own customers. See, e.g., *Durr Drug Co. v. Long*, 188 So. 873, 874 (Ala. 1939) ("In fact and law the inclusion of such costs of [medicine cartons, pills boxes and medicine bottles] in the price of the medicines sold is (footnote continued on following page)

Moreover, incumbent LECs cannot transform a retail service – xDSL loop service – into a wholesale access service simply by bundling it with a packet switching service. There is no dispute that xDSL loop service is offered at retail. U S WEST, for example, recently tariffed its xDSL loop service for sale to retail customers.<sup>258</sup> And the Commission has indicated that it may require the ILECs who have filed xDSL “access” tariffs to file retail xDSL loop tariffs with the relevant state commissions.<sup>259</sup> The Commission should not, therefore, allow

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not a resale, but is the method of passing the cost of such containers in the price to the customers of the retailer. . . . The use of the bottles by the wholesaler . . . makes it a consumer.”); Birmingham Paper Co. v. Curry, 190 So. 86 (Ala. 1939) (Sales to other manufacturers by a paper company of its boxes, cartons, and containers to other manufacturers who use those containers for packing their products is a retail transaction); Poer v. Curry, 8 So.2d 418 (Ala. 1942) (Sales of caps, crowns, and tops to a manufacturer of bottled soft drink manufacturer was a retail transaction); Sluis v. Nudelman, 34 N.E.2d 391, 392 (Ill. 1941) (The sale of fruit trees is a retail transaction even though the fruit trees may bear fruit that will be sold); id. (the sale of ink to a firm making letterheads is a retail transaction); id. (the purchase of seeds to a farmer who intends to plant the seeds and grow produce for sale is a retail transaction); In re H. D. Kampf, Inc., 38 F.Supp. 319 (S.D.N.Y., 1941) (the purchase of dyes for use in dyeing textiles is for consumption and not resale).

<sup>258</sup> See, e.g., U S WEST Advanced Communication Services Tariff (Utah), effective September 2, 1997, Section 8, p. 1 (xDSL service).

<sup>259</sup> See Bell Atlantic Telephone Companies, Tariff No. 1, Transmittal No. 1076, CC Docket No. 98-168, Order Suspending Tariff and Designating Issues for Investigation, (released September 15, 1998); BellSouth Telecommunications, Inc., BellSouth Tariff FCC No., BellSouth Transmittal No. 476, CC Docket No. 98-161, Order Suspending Tariff and Designating Issues for Investigation, (released September 1, 1998); GTE Telephone Operators, GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, Order Designating Issues for Investigation, (released August 20, 1998); Pacific Bell Telephone Company, Pacific Bell Tariff FCC No. 128, Pacific Transmittal No. 1986, CC Docket No. 98-103, Order Designating Issues for Investigation, (released September 2, 1998).



ILECs to escape their resale obligation in this proceeding through an artificial bundling of its retail and access services.

**VIII. THE POTENTIAL AVAILABILITY OF ADVANCED SERVICES TO RESIDENTIAL AND SMALL BUSINESS CUSTOMERS MAKES THE NEED FOR ACCESS CHARGE REFORM MORE PRESSING THAN EVER.**

MGC Communications (pp. 46-56) also highlighted the need for access charge reform in order to remove the inefficient market distortions the current access charge regime creates. As the availability of advanced services spreads to residential and small business customers, the current proliferation of phone-to-phone IP services will accelerate. Phone-to-phone IP services offer customers dial-up access using traditional handsets to long distance services via private or public internet backbone facilities. Companies such as Qwest, IDT, and ICG, as well as AT&T with its "Connect 'n' Save" offering, are providing phone-to-phone IP services to more and more customers every day.<sup>260</sup> The primary attraction of phone-to-phone IP services is that they permit service providers to avoid the inflated access charges currently assessed by incumbents. Those charges create an artificial incentive for carriers to deploy phone-to-phone IP service facilities.<sup>261</sup>

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<sup>260</sup> See also "Calling all ISPs," *Wired News*, (October 9, 1998) ("ISPs, along with calling-card companies and smaller telcos, are pooling their network resources to make IP telephony services more widely available to consumers in the United States and around the world."); id. ("Now, AT&T . . . is getting into the act, becomes the first telco to set up a clearinghouse shop. . . . AT&T's Global Clearinghouse lets participating ISPs, telcos, or calling-card companies offer their customers low-cost, phone-to-phone or phone-to-PC calling in 140 cities in the United States, Asia, and Europe").

<sup>261</sup> At the same time, IP voice and data applications promise to bring an array of attractive new services to customers and represent the kind of expanded competition Congress (footnote continued on following page)

Even more critical, however, is the need to reduce access charges to cost in order to stop the ILECs from garnering supracompetitive profits from their access charges -- excessive revenues that they obtain from their potential IXC competitors which keep those IXCs' retail prices artificially high and line the ILECs' pockets with cash to ready them for long distance entry. It defies logic to allow -- via regulatory fiat -- monopolists in one market to leverage their monopolies by requiring their future competitors to fund their entry into those competitors' markets. This amounts to nothing more than a tax on the customers of the competitive carriers, and an unconscionable subsidy to monopolists.

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envisioned when it passed the Telecommunications Act. Phone-to-phone IP services should not be penalized through the imposition of bloated, subsidy-laden access charges. See MGC, p. 46. Only once the incumbents have convincingly demonstrated that access charges have fallen to efficient levels through competition or prescription for all users of access services should the Commission consider imposing the same cost-based access charges on phone-to-phone IP service providers.

## CONCLUSION

For the aforementioned reasons, AT&T urges the Commission to adopt the recommendations set forth in these Reply Comments. First, the Commission should not adopt its separate affiliate proposal. If the Commission nevertheless does implement that proposal, it should strengthen significantly the requirements on the ILEC and its affiliate. Second, the Commission should adopt AT&T's proposed rules with regard to loops, OSS, collocation, unbundling and resale; and the Commission should not allow the BOCs to evade Section 271's requirements for interLATA BOC entry by adopting a policy of piecemeal interLATA relief. Finally, the Commission should accelerate the process of reducing currently bloated access charges to competitive levels so that entrants and incumbents alike will have the proper incentives when deploying new services such as phone-to-phone IP service.

Respectfully submitted,

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October 16, 1998

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America's Carriers Telecommunication Association ("ACTA")  
Ameritech  
Association For Local Telecommunications Services ("ALTS")  
AT&T Corp. ("AT&T")  
Bell Atlantic Corporation ("Bell Atlantic")  
BellSouth Corporation ("BellSouth")  
Cable & Wireless, Inc. ("CWI")  
Cablevision Lightpath, Inc. ("Cablevision")  
People of the State of California and the Public Utilities Commission of the State of California ("California")  
California Technology Assistance Program ("CTAP")  
Central Texas Telephone Cooperative, Inc. ("CTTC")  
Cincinnati Bell Telephone Company ("Cincinnati Bell")  
Coalition Of Utah Independent Internet Service Providers ("Utah")  
Commercial Internet Exchange Association ("CIX")  
Communications Workers of America ("CWA")  
Competition Policy Institute ("CPI")  
Competitive Telecommunications Association ("CompTel")  
Computer & Communications Industry Association ("CCIA")  
Consumer Federation of America ("CFA")  
Copper Mountain Networks  
Cottonwood Communications  
Covad Communications Company  
CTSI, Inc.  
e.spire Communications, Inc. ("e.spire")  
Federal Trade Commission Staff Economists ("FTC Staff Economists")  
First Regional Telecom, LLC and FirstWorld Communications, Inc. ("First Regional")  
Florida Digital Network, Inc. ("Florida Digital Network")  
Florida Public Service Commission ("Florida")  
General Services Administration ("GSA")  
GST Telecom Inc. ("GST")  
GTE Service Corporation ("GTE")  
GVNW, Inc./Management ("GVNW")  
Hyperion Telecommunications, Inc. ("Hyperion")  
ICG Telecom Group, Inc. ("ICG")  
Illinois Commerce Commission ("Illinois")  
Indiana Utility Regulatory Commission and the Technical Staff of the Public Service Commission of Wisconsin ("Indiana and Wisconsin")

Information Technology Association of America ("ITAA")  
 Intermedia Communications Inc. ("Intermedia")  
 Internet Access Coalition ("IAC")  
 Internet Service Providers' Consortium ("ISP")  
 Keep America Connected, et al.  
 Kiesling Consulting LLC  
 KMC Telecom, Inc. ("KMC")  
 Level 3 Communications, Inc. ("Level 3")  
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 McLeodUSA Telecommunications Services, Inc. ("McLeodUSA")  
 MGC Communications, Inc. ("MGC")  
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**CERTIFICATE OF SERVICE**

I, Scott M. Bohannon, do hereby certify that on this 16th day of October, 1998, I caused a copy of the foregoing Reply Comments of AT&T Corp. to be served upon each of the parties listed on the attached Service List by U.S. First Class mail, postage prepaid.

A handwritten signature in cursive script, reading "Scott Bohannon", written over a horizontal line.

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